Supreme Court, U.S.
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No. ________

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In The

Supreme Court of the United States

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CASE AND POINT, INC.,
MDII ENTERTAINMENT, INC., et al.,

Petitioners,

v.

CITY OF DALLAS, TEXAS,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

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October 11, 2002

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QUESTION PRESENTED

Whether, consistent with this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, a municipal government may increase the restriction of and burden on the exercise of protected expression through the amendment of an ordinance regulating adult businesses, in the absence of evidence linking the increased restriction to a suppression of secondary effects.

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are:

Case and Point, Inc.
MDII Entertainment, Inc.
D. Burch, Inc.
Mainstage, Inc.
Allen-Burch, Inc.
Petitioners

City of Dallas, Texas
Respondent

In addition to these entities, the following parties also participated in the proceedings in the district court and the Fifth Circuit:

Baby Dolls Topless Saloons, Inc.
Club Hospitality, Inc.
OGC Restaurants
Santa Fe Cabaret, LLC
Dimitri Papathansiou
Tom K. Lazanas

RULE 29.6 STATEMENT

Petitioners Case and Point, Inc.; MDII Entertainment, Inc.; D. Burch, Inc.; Mainstage, Inc.; and Allen-Burch, Inc. are corporations whose stock is not publicly traded. MDII Entertainment, Inc.; D. Burch, Inc.; and Allen-Burch, Inc. are wholly owned subsidiaries of Burch Management Company, Inc., a privately held corporation. No other Petitioner has a parent company and no publicly traded company owns 10% or more of the outstanding stock of any Petitioner or of any Petitioner's parent corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Rule 29.6 Statement	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Ordinances Involved	1
Statement of the Case	3
I. Introduction	3
II. Factual Background	4
III. Course of the Proceedings Below	7
Reasons for Granting the Petition	10
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed. 2d 504 (1991)..14

City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed. 2d 265 (2000)..14

City of Los Angeles v. Alameda Books, Inc., 535 U.S. ___, 122 S.Ct. 1728, 152 L.Ed. 2d 670 (2002)........*passim*

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 2d 29 (1986)...................9, 16

Dumas v. City of Dallas, 648 F.Supp. 1061 (N.D. Tex. 1986), *aff'd sub nom, FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed. 2d 603 (1990)..4, 5

MDII Entertainment, Inc. v. City of Dallas, 935 F.Supp. 1394 (N.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir. 1996)..6, 7, 14, 16

N.W. Enterprises, Inc. v. City of Houston, 27 F.Supp. 2d 754 (S.D. Tex. 1998)...12, 17

Nakatomi Investments, Inc. v. City of Schenectady, 949 F.Supp. 988 (N.D. N.Y. 1997)............................12, 15

Ranch House, Inc. v. Amerson, 238 F.3d 1273 (11th Cir. 2001)..12

World Wide Video of Washington, Inc. v. City of Spokane, 2002 WL 31194488 (E.D. Wash., September 11, 2002)..10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 4
42 U.S.C. § 1983 .... 2, 4
Chapter 14, Dallas City Code 3, 6, 7
Chapter 41A, Dallas City Code .... *passim*
Dallas Ordinance 21837 6
Dallas Ordinance 23137 .... *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioners Case and Point, Inc.; MDII Entertainment, Inc.; D. Burch, Inc.; Mainstage, Inc.; and Allen-Burch, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 295 F.3d 471 (5th Cir. 2002) and is reprinted in the Appendix at App. 1 – App. 26. The opinion of the district court is reported at 114 F.Supp. 2d 531 (N.D. Tex. 2000) and is reprinted in the Appendix at App. 27 – App. 66.

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JURISDICTION

The judgment of the court of appeals was entered on June 20, 2002. The court of appeals denied a timely petition for rehearing on July 16, 2002 (App. 70 – App. 71). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

UNITED STATES CONSTITUTION

Amendment I

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

DALLAS CITY CODE

Ordinance 23137 of the City of Dallas, Texas, amending Chapters 14 and 41A of the Dallas City Code, is reprinted in pertinent part in the Appendix at App. 72 – App. 82

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STATEMENT OF THE CASE

I. Introduction

Petitioners Case and Point, Inc., doing business as Bare Facts; MDII Entertainment, Inc., doing business as Fare West; D. Burch, Inc., doing business as Baby Dolls Saloon; Mainstage, Inc., doing business as PT's Gentlemen's Club; and Allen-Burch, Inc., doing business as The Fare (collectively "Petitioners") operate cabarets located in the City of Dallas, Texas ("Dallas" or the "City"), which offer live performances of erotic dance by female entertainers. Immediately prior to May 28, 1997, all of the Petitioners' businesses featured erotic dancers clothed in bikini bottoms and opaque pasties covering the areola of the breast, and all were located and operating lawfully under the provisions of the existing regulatory scheme of the City of Dallas for dance halls, Chapter 14 of the Dallas City Code.

On May 28, 1997, the Dallas City Council enacted Ordinance 23137 (the "Ordinance"), which amended both Chapter 14 of the Dallas City Code and Chapter 41A, which regulates sexually oriented businesses, in such a way as to render either the location or the operation of Petitioners' establishments unlawful and to require them either to close or relocate, on the one hand, or to alter significantly the erotic nature of their dance performances by adding a full bikini top to the dancers' dress.

Petitioners brought suit against the City of Dallas in the United States District for the Northern District of Texas seeking declaratory and injunctive relief with respect to the Ordinance. They did so by intervening in an existing action initiated by Baby Dolls Topless Saloons, Inc. challenging the enforcement of certain other aspects of the Ordinance. The interventions, like the initial suit, alleged denial by the City of rights guaranteed to Petitioners by the First and Fourteenth Amendments to the United States Constitution. Federal jurisdiction was asserted, and recognized by the district court (App. 47), on the basis of 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

II. Factual Background

In 1986, the City of Dallas first enacted Chapter 41A of the Dallas City Code. This new chapter was a comprehensive set of zoning and licensing regulations for sexually oriented businesses (App. 29). Included among the regulated establishments were "adult cabarets," defined to include a "nightclub, bar, restaurant, or similar commercial establishment," which, among other things, "regularly" featured "persons who appear in a state of nudity." Nudity, in turn, was defined as "the appearance of a bare buttock, anus, male genitals, female genitals, or female breast." (App. 30).

Under this regulatory scheme, dance performances by persons in this state of undress could only take place at establishments licensed by the City under Chapter 41A. In order to obtain such a license, the business had to be located at least 1,000 feet from all other sexually oriented businesses, which included not only cabarets, but also movie theatres, bookstores, video stores and motels that featured specified adult fare, as well as 1,000 feet from any and all schools, residential areas and parks. This zoning aspect of the Dallas ordinance was upheld in litigation challenging the regulatory scheme, first by the district court, then by the Fifth Circuit and finally by this Court. *See Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D.

Tex. 1986), *aff'd sub nom., FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part on other grounds*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed. 2d 603 (1990).[1]

Petitioners, not wishing to close their businesses or to undertake the expensive and uncertain task of moving to a sufficiently isolated location (breaching long term lease commitments), determined not to operate "sexually oriented businesses" as defined by the new law. Accordingly, they did not offer performances by nude dancers, choosing instead to present erotic dances by women clothed in bikini bottoms and clear pasties. Operating in this fashion, Petitioners were "dance halls" within the meaning of Chapter 14 of the Dallas City Code, and their locations and operations remained lawful after 1986, just as they had been before. (R. Vol. 9, p. 2203).[2]

In 1992, the Dallas City Council amended Chapter 14 of the City Code to add new regulations for dance halls. Specifically, the City imposed upon dance halls operating as Petitioners were then, with dancers wearing bathing suit bottoms and clear pasties, location restrictions similar to those decreed for sexually oriented businesses under Chapter 41A. Again not wishing to close or to move, Petitioners responded, as they had after the enactment of Chapter 41A, by conforming their dancers' attire to the new regulation; that is, by adding covering so that the dancers were not within the regulated category. After the 1992 amendments, Petitioners offered performances in which women danced while wearing bikini bottoms and opaque coverings extending beyond the areolae of their breasts.

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[1] This Court held the licensing procedure of Chapter 41A constitutionally deficient for its failure to provide either a time limit for the licensing decision or prompt judicial review of a license denial. 493 U.S. at 225-230, 110 S.Ct. at 604-07.

[2] Citations to the Record on Appeal [R.] will be to the volume [Vol.] and page [p.] number.

Displeased with the decisions by Petitioners to conform their behavior to the Code, rather than violate it, close down, or move, the City enacted yet another Ordinance, No. 21837, on October 13, 1993. This new legislation amended both Chapters 14 and 41A of the Dallas City Code. The City Council asserted that the amendments were necessary "because certain businesses [, such as [Petitioners',]] featuring adult entertainment found a way to circumvent the locational restrictions set forth in Chapters 14 and 41A." (App. 33). The "circumvention" to which Ordinance No. 21837 referred with disapproval was the Petitioners' decision not to feature dancers wearing less clothing than stipulated in the Code for their locations. The effect of the 1993 ordinance was to raise the expressive bar, to require yet more clothing on Petitioners' erotic dancers. Accordingly, if they wished to remain in business at their historic locations, "[i]n effect, the ordinance required [Petitioners] to change their dancers attire by making them wear bikini tops. . . . " (App. 34).

This new restriction on Petitioners' First Amendment expression prompted a suit in the United States District Court for the Northern District of Texas. As a consequence of that action, the incremental change and enhanced regulation by the City in 1993 was struck down as an unconstitutional content-based restriction on expression. *See MDII Entertainment, Inc. v. City of Dallas*, 935 F.Supp. 1394 (N.D. Tex. 1995), *aff'd*, 85 F.3d 624 (5th Cir.

1996). The district court found, and the Fifth Circuit concurred, that "no evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." 935 F.Supp. at 1397; App. 35.

The City's response to this federal judicial rejection of its attempt at additional regulation was to pass the Ordinance currently under review, No. 23137 (the "Ordinance"), in 1997. (App. 72 – App. 82). Like its 1993 predecessor, the 1997 Ordinance amended both Chapter 14 and Chapter 41A of the Dallas City Code. And, while some of the old regulatory category names were abandoned – notably the states of "semi-nudity" and "simulated nudity" were replaced by reference to "specified anatomical areas" (App. 76, App. 81) – the legal effect of the new Ordinance was precisely the same with respect to the Petitioners' activities – put on bikini tops or move, if you can. (R. Vol. 9, p. 2208). Indeed, the district court found that "[t]he amended definitions [in the Ordinance] contain the same language that this Court found unconstitutional in *MDII(1).*" (App. 39).

Given that the City had waited less than two years and essentially simply re-enacted a statute already struck down by the district court, in a decision affirmed by the court of appeals, Petitioners brought the present action, in that same district court, seeking the same relief – an injunction against enforcement of the Ordinance to close down Petitioners' businesses at their existing locations.

III. Course of the Proceedings Below

The proceedings below began with a consideration of the Petitioners' Motion for Preliminary Injunctive Relief.

Following a two-day hearing on January 7 and 8, 1998, the district court ruled that an injunction should be granted precluding enforcement of portions of Chapter 41A against Petitioners because, among other infirmities, the amendment wrought by the Ordinance was probably an impermissible content restriction on protected speech. (R. Vol. 14, p. 7). The district court found that previous district court and Fifth Circuit decisions had stuck down the substantially identical 1993 Ordinance, and that, despite studies undertaken by the City, there was still no evidence to support the conclusion that requiring dancers to wear bikini tops correlates to a reduction in harmful secondary effects. The district court found that it was, therefore, likely that the City's main goal in enacting the Ordinance was to restrict the essential expressive nature of Petitioners' business and to decrease the quantity of constitutionally protected erotic expression available in the City. (R. Vol. 14, pp. 7-8).

A bench trial on the requests for permanent declaratory and injunctive relief was held in September, 1998. The Final Judgment of the district court (App. 67 – App. 69) and its Findings of Fact and Conclusions of Law (App. 27 – App. 68) came in May of 2000. In its final decision on the merits, the district court reversed itself on the issue of the constitutionality of the increased restriction on expression at Petitioners' establishments, finding the bikini bathing suit requirements of the new Ordinance constitutional.

This change in opinion was not based on any additional evidence with respect to the efficacy of the new restrictions, because there was none. The district court expressly found that the City's expert on the matter of secondary effects, the Malin Group, "did not study whether a change in a dancer's attire from pasties to bikini tops would affect secondary effects." Further, the district court noted that "Mr. Malin also testified that his studies indicated that the change in attire would not have an impact on secondary effects." (App. 44).

Despite this express finding that the City was acting to decrease the quantity and accessibility of protected expression without advancing any basis for concluding that it would contribute to the suppression of secondary effects, the district court nevertheless upheld the additional restrictions. It did so on the ground that the Ordinance merely closed a "loophole" (App. 60) in the existing regulatory scheme and required no additional evidentiary support.

Petitioners appealed the denial of relief by the district court to the Fifth Circuit. On the specific holding at issue here – the constitutionality of the additional restriction of expression at Petitioners' establishments – the court of appeals affirmed, finding that the decision of the district court on the evidentiary requirement for additional regulation of expression was consistent with the reading given to *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 2d 29 (1986), by the plurality opinion of this Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. ___, 122 S.Ct. 1728, 152 L.Ed. 2d 670 (2002). (App. 17). The court of appeals explained that its task was to determine "whether, under this *reasonable belief* standard [of *Renton*], the City's evidence demonstrates a *link* between its interest in combating secondary effects and the Ordinance." (App. 18) (emphasis in original). It found that necessary link in the City's evidence of increased criminal activity in areas with a concentration of sexually oriented businesses. The court of appeals, like the district court, concluded that it was not necessary to correlate the increased regulation to a reduction in secondary effects, given that the City was merely preventing the "exploitation of a 'loophole' in the City Code" and could reasonably conclude "that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other [sexually oriented businesses]." (App. 19 – App. 20).

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REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case, coming just five weeks after this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, and relying explicitly on its authority in upholding the constitutionality of the amended Dallas Ordinance will, if uncorrected, go far toward shaping the understanding and application of the *Alameda Books* decision in the lower courts.[3] This is a result which this Court has a substantial interest in preventing.

The Court granted certiorari in *Alameda Books* "to clarify the standard for determining whether an ordinance serves a substantial government interest under *Renton*. . . . " 535 U.S. at ___, 122 S.Ct. at 1733. While the ultimate absence of a single majority opinion cuts against the clarification the Court intended, one thing can be said with certainty: the evidentiary standard used in the present case by the district court and the court of appeals to uphold the constitutionality of Dallas's new restrictions on protected expression violates the teachings of all three of the opinions in *Alameda Books*.

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[3] *See, e.g., World Wide Video of Washington, Inc. v. City of Spokane*, 2002 WL 31194488, *11 (E.D. Wash., September 11, 2002) ("The Fifth Circuit held the city needed only to produce some evidence of adverse secondary effects produced by adult entertainment in order to justify an enactment using the secondary effects doctrine.").

In this regard, the plurality opinion held, in assessing the nature of the evidence needed to support the connection between a restriction on First Amendment activity and the suppression of harmful secondary effects, that a municipality cannot "get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." 535 U.S. at ___, 122 S.Ct. at 1736. While concurring in the judgment of the Court reversing the summary judgment against the City of Los Angeles and remanding the case for further proceedings, Justice Kennedy observed that, in such subsequent proceedings, "a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." 535 U.S. at ___, 122 S.Ct. at 1742. Finally, Justice Souter, in a dissent which three other members of this Court joined, cautioned that "the government's freedom of experimentation [under *Renton*] cannot displace its burden under the intermediate scrutiny standard to show that the restriction on speech is no greater than essential to realizing an important objective. . . . " 535 U.S. at ___, 122 S.Ct. at 1750.

In contrast to these strictures against shoddy evidence, the suppression of secondary effects through the suppression of protected expression, and greater restrictions than are demonstrably necessary, in this case, the courts below permitted a municipality to restrict the Petitioners' offering of protected expression to the public while simultaneously finding that the City had offered no evidence that its increased restrictions on speech correlated at all to a decrease in secondary effects. Indeed, the decisions below have upheld a requirement that Petitioners clothe their erotic dancers, under penalty of having to close or move their businesses, in the face of the evidence from the City's own expert that this action will have no effect on secondary effects at all. (R. Vol. 12, pp. 216, 252).

In this case, the district court and the court of appeals have taken the admonition of Justice Kennedy's concurrence in *Alameda Books* and have produced its precise opposite. They have permitted the City of Dallas to suppress the quantity and accessibility of speech while leaving the secondary effects intact. If the decision below is permitted to stand, this incorrect reading is likely to be the legacy of *Alameda Books* in the lower courts. This Court should act now, in this case, which, unlike *Alameda Books*, comes on a full trial record, with the City having taken its best evidentiary shot.

A writ of certiorari is necessary here to prevent a serious misreading and misapplication by the lower courts of what was meant to be a clarifying decision in an area of widespread litigation. The situation which arose in Los Angeles, and in Dallas, is not confined to those two locations. Throughout the United States, municipalities, counties and states that regulate the location and operation of adult businesses regularly amend their ordinances and statutes. Invariably, this is done to tighten the regulations and is frequently based on a recent court decision in the respective jurisdictions holding a certain regulation constitutional. *See, e.g., Ranch House, Inc. v. Amerson*, 238 F.3d 1273 (11th Cir. 2001); *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp. 2d 754 (S.D. Tex. 1998); *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F.Supp. 988

(N.D. N.Y. 1997). When amendments are made, the governing body generally just refers back to the underlying goals of the ordinance and claims that the new regulations are still designed to further reduce the negative secondary effects said to be associated with adult uses. While the original ordinances are adopted following studies showing a general link between sexually oriented businesses and an increase in crime and a reduction in property values in the adjacent areas, the studies do not in any way measure the impact of the cities' ordinances on the targeted effects.

When amendments to city ordinances regulating adult uses are enacted, ostensibly to strengthen the regulations and close "loopholes," the same link between the presence of adult businesses and a negative impact on certain protected uses is portrayed as justifying the amendments. The usual amendment is claimed by the government to be needed to address the same secondary object as the original ordinance. And, while not all may go so far as the case at bar, in which the district court found that there is no link (based on the testimony of the City's expert) between the specific amendment (requiring erotic dancers to wear bikini tops instead of pasties) and the reduction of secondary effects, in general, the amendments are not shown by any empirical data to be effective. They are simply upheld as "closing a loophole" without consideration of the impact of the amendment on expression versus a likely reduction in secondary effects. The use of such ordinance amendments to further restrict the location and operation of adult uses adversely affects the adult business industry, since the scope of regulation requires relocation, a change in operations and business disruptions, and it significantly impacts both the quantity and accessibility of protected erotic expression.

Unlike *Alameda Books*, this case deals not with sexually explicit books and videotapes, but with erotic dance. That factor does not diminish the significance of the decision below for First Amendment jurisprudence in the aftermath of the *Alameda* decision. This Court has repeatedly held that erotic dance of the type offered by Petitioners falls within the protection of the First Amendment, albeit its outer ambit. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed. 2d 265 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S.Ct. 2456, 2460, 115 L.Ed. 2d 504 (1991). Moreover, the restriction imposed by the Ordinance at issue, a requirement of bikini tops if Petitioners wish to keep their current establishments open, raises the level of interference with protected activity into an area of significance. This Court upheld the prohibition on nude dancing at issue in *City of Erie v. Pap's A.M.*, *supra*, because "[t]he requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and *the restriction leaves ample capacity to convey the dancer's erotic message*." 529 U.S. at 301, 120 S.Ct. at 1397 (emphasis added). Here, in contrast, the bikini bathing suit requirement strikes at the very essence of the erotic message and, as Petitioners' trial expert noted, effectively mutes it. (R. Vol. 15, pp. 41-42). Certainly, based on the precedent of this Court, a bathing suit rule for erotic dance cannot be dismissed as a *de minimis* decrease in the quantity or nature of erotic expression. *See MDII Entertainment, Inc. v. City of Dallas, Tex.*, 935 F.Supp. 1394, 1398-99 (N.D. Tex. 1995), *aff'd*, 85 F.3d 624 (1996) ("In the instant action, however, the City has gone far beyond a restriction aimed at nudity and a requirement that the dancers wear pasties and G-strings. To maintain their current business locations, Plaintiffs would have to dress their dancers in bikini tops. The new amendments are directed at the essential expressive nature of Plaintiffs' businesses and are content-based restrictions.").

A comparison between the opinions of this Court in *Alameda Books* and the district court's Findings of Fact, on the basis of which the court of appeals affirmed the denial of relief, is illuminating. The district court specifically made fact findings that (a) no study correlates any impact between the attire change required by the Ordinance and a reduction in secondary effects; and (b) the City's expert's opinion was that requiring dancers to wear bikinis would have no impact on secondary effects. (App. 44). Both Los Angeles in *Alameda Books* and Dallas here were attempting to close supposed "loopholes" in prior ordinances. Contrary to the opinions below, however, the law post-*Alameda* is not that the closing of a "loophole" is a justification for an ordinance amendment based on prior studies. Rather *Alameda* teaches that an amendment which further restricts First Amendment activities must itself be justified based on its expected reduction of secondary effects and without that reduction occurring merely from a decrease in the amount or availability of protected activity. 535 U.S. at ___, 122 S.Ct. at 1742 (Kennedy, J.). *See Nakatomi Investments, Inc. v. City of Schenectady*, 949 F.Supp. at 997 ("[E]ach additional piece of required clothing must result in a further reduction of pernicious side effects. Without demanding this connection at each step, each additional layer of restriction can be legally added simply on the basis that the previous restriction was valid, until the entire activity is banned: i.e. nude dancing is permitted so long as the dancers wear pasties and

G-strings; then bathing suits; then t-shirts; then long pants and a sweater.").

The amended Dallas Ordinance directly targets the essential nature of erotic dance, *MDII Entertainment, Inc.*, *supra*, 935 F.Supp. at 1399, without any showing that this curtailment of expression is expected to reduce crime rates in the area, other than by causing the businesses to close. If, as noted in the court of appeals opinion (App. 19), the correlation actually found by the City's expert was between the hours of operation and higher crime rates, the City's "experiment" should be directed to the hours, not again to the attire.

In addition to the one Dallas-specific study conducted by the Malin Group, the City also sought to support its increased level of restriction on protected activity by the use of four studies conducted in the City of Houston from 1983 to 1997. (App. 42). This was an inherently flawed strategy. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) does allow cities to rely on studies from other venues in support of their regulatory provisions, since an ordinance regulating adult uses need not be based on the actual experience of the particular city. Accordingly, a new ordinance separating adult uses is constitutional if based on evidence from other cities demonstrating that the concentration of such uses correlates to adverse secondary effects, since it can be inferred that the separation solution will address the concentration problem. However, as noted in *Alameda Books*, there must be a link between the specific regulation (i.e., the amendment) and the governmental interest in combating secondary effects. The trial record in the case at bar, as distinguished from the summary judgment context of *Alameda*, includes findings of fact that no such requisite link is present. This is a case in which the municipality's assumptions not only "can be proved unsound at trial," but in which they *were* proven so. Accordingly, this is an ordinance that does "not withstand intermediate scrutiny." 535 U.S. at ___, 122 S.Ct. at 1744. (Kennedy, J., concurring).

The error of law committed by both the district court and the court of appeals was to consider the secondary effects purpose of the City's regulations as a whole, and not the specific amendment at issue. This approach is not followed by the plurality, the concurrence or the dissent in *Alameda Books*.

In *N.W. Enterprises Inc. v. City of Houston*, *supra*, the very Houston studies relied upon by the City of Dallas to justify the new restrictive zoning were found by the district court to be inapplicable to an amendment increasing the buffer zone distance for sexually oriented businesses. 27 F.Supp. 2d at 875. The court held that, in adopting amendments to the existing ordinance, the Houston city government had to demonstrate a reasonable basis for believing that an increase in distance restrictions would address negative secondary effects *actually* and *currently* attributable to sexually oriented businesses in Houston. *Id.* The court noted that each time a City chooses to impose new restrictions on protected speech, as Houston had done by increasing its ordinance's distance requirements for sexually oriented businesses, it must satisfy the requisite constitutional test. *Id.* at 811. As found by the district court, the City of Houston overstated its authority when it asserted that it had the absolute right to experiment with measures to control adverse secondary effects of sexually oriented businesses. *See id.* Now, in this case, the

City of Dallas suggests that it can repeat a failed "experiment" at will and perhaps manage to find a constitutional ordinance along the way.

Experimentation with First Amendment rights is a valid, frequently productive, activity for individual citizens. Experimentation with restrictions on First Amendment rights is, while not entirely forbidden, certainly a highly circumscribed activity for government bodies. In this case, the City of Dallas has acted to restrict protected expression without the evidence to support a reasonable belief that it will combat the secondary effects the City presumably wishes to reach. If the court of appeals and district court decisions sanctioning that action are permitted to stand, any "clarification" hoped for from *Alameda Books* will be lost and secondary effects will be targeted largely through a reduction in the quantity and accessibility of free expression.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10651

BABY DOLLS TOPLESS SALOONS, INC.,
doing business as Baby Dolls Saloon-East,

Plaintiff-Appellant,

CASE AND POINT, INC., doing business as Bare Facts; MD II ENTERTAINMENT, INC., doing business as Fare West; D. BURCH, INC., doing business as Baby Dolls; MAINSTAGE, INC., doing business as PT's Gentlemen's Club; CLUB HOSPITALITY, INC., doing business as Club Lipstick; OGC RESTAURANTS, doing business as Obsessions; SANTA FE CABARET, LLC, doing business as Santa Fe Cabaret; DIMITRI PAPATHANSIOU, doing business as Doll's House; TOM K. LAZANAS, doing business as Baby G's, doing business as Faces; ALLEN-BURCH, INC., doing business as the Fare,

Intervenor Plaintiffs-Appellants.

v.

CITY OF DALLAS, TEXAS,

Defendant-Intervenor Defendant-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

June 20, 2002

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Primarily at issue is whether the City of Dallas violated certain establishments' First Amendment rights when it amended its City Code to effectively require female performers to wear bikini tops, among other things, in order for those establishments to avoid being classified as sexually oriented business (SOBs), subject, *inter alia,* to zoning restrictions. Plaintiff and Intervenors (Plaintiffs), operators of those establishments, contend: the City is collaterally estopped from litigating the constitutionality of the amendment in the light of a similar City amendment's having been held unconstitutional; the relied-upon studies show no correlation between the bikini top requirement and the amelioration of deleterious secondary effects; the amendment is overbroad; for a related amendment, dancer-patron contact is protected expressive conduct; and the City's practice of zoning residential districts to the middle of roadways is unconstitutional. **AFFIRMED**.

I.

In 1986, after studying other cities' efforts in regulating SOBs, the City enacted Chapter 41A of the Dallas City Code "to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of [SOBs] within the city". Dallas, Tex., Code § 41A-1 (1986). Among other things, Chapter 41A subjected SOBs to certain zoning restrictions, including the requirement that they be located at least 1,000 feet from other SOBs, churches, schools, residential areas, and parks (location provision). It defined a SOB as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center". *Id.* § 41A-2(17). Chapter 41A-2 contained the following definitions:

> (3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
>
> > (a) persons who appear *in a state of nudity;* or
> >
> > (b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
> >
> > (c) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

. . . .

> (13) NUDITY OR STATE OF NUDITY means the appearance of a bare buttock, anus, male genitals, female genitals, or *female breast.*

. . . .

> (18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(Emphasis added.) These definitions, as well as the location provision, were held constitutional. *See Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986), *aff'd sub nom. FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298

(5th Cir. 1988), *aff'd in part, rev'd in part and vacated in part on other grounds,* 493 U.S. 215 (1990).

In order to avoid SOB status and, as a result, inter alia, having to relocate, some establishments (including most of Plaintiffs') changed their dancers' attire to "simulate" nudity: bikini bottoms and flesh-colored pasties over the areolae of the female breast. Doing so enabled them to obtain "dance hall" licenses under Dallas City Code Chapter 14. (As the district court noted in this action, consistent with findings stated in the Ordinance at issue, Chapter 14 "did not, and wasn't designed to, regulate [SOBs]". *Baby Dolls Topless Saloons, Inc. v. City of Dallas,* 114 F. Supp. 2d 531, 535 (N.D. Tex. 2000).)

In the face of this attempt, through Chapter 14, to avoid SOB status, the City enacted Ordinance 21184 in 1992, amending Chapter 14 to create a new classification of dance halls: Class D. Establishments receiving the new Class D classification were *subject to location provisions similar to those in Chapter 41A, covering SOBs.* In short, the new Class D status was equivalent to being a SOB.

That ordinance contained, *inter alia,* the following definitions:

> CLASS D DANCE HALL means any place:
>
> (A) where dancing is permitted one day a week or more by a person in a state of *semi-nudity or simulated nudity*[.]
>
> . . . .
>
> SEMI-NUDITY means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and *areolae of the female breast.* . . .

> SIMULATED NUDITY means a state of dress in which a device or covering, exposed to view, is worn that simulates any part of the genitals, buttocks, pubic region, or *areolae of the female breast.*

Dallas, Tex., Ordinance 21184 (emphasis added). The location provisions and simulated nudity definition were upheld against First Amendment challenges. *See MD II Entm't, Inc. v. City of Dallas*, No. 3:92-CV-1090-H, 1993 WL 227774 (N.D. Tex. 1993) (*MD II(1)*), *aff'd*, 28 F.3d 492 (5th Cir. 1994).

Therefore, *again to avoid SOB status and resulting relocation,* many establishments (including most of Plaintiffs') once more changed their dancers' attire: to non-flesh-colored, opaque pasties and bikini bottoms substantially covering the pubic region and buttocks. Doing so enabled them to apply for, and operate under, Class A dance hall licenses, instead of having Class D/SOB status and being required to relocate.

As a result, in 1993, the City enacted Ordinances 21837 and 21838, amending Chapters 14 and 41A respectively, "because certain businesses *featuring adult entertainment* [had] found a way to circumvent the location restrictions set forth in [those] Chapters". *Baby Dolls*, 114 F. Supp. 2d at 536. The new ordinances included the following definitions:

> NUDITY or a STATE OF NUDITY means:
>
> (A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or
>
> (B) a state of dress that fails to opaquely cover a human buttock, anus, male genitals, female

> genitals, or *any part of the female breast below the top of the areola.*
>
> . . . .
>
> SEMI-NUDITY means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and *any part of the female breast below the top of the areolae.* . . .
>
> . . . .
>
> SIMULATED NUDITY means a state of dress in which any device or covering, exposed to view, is worn that simulates any part of the genitals, buttocks, pubic region, or *any part of the female breast below the top of the areolae.*

Dallas, Tex., Ordinances 21837, 21838 (emphasis added; 21837 (amending § 14) *and* 21838 (amending § 41A) were enacted the same day.) The effect of the ordinances was to require dancers at businesses such as Plaintiffs' to, among other things, wear bikini tops in order for the businesses to avoid SOB classification and concomitant relocation.

The amendments to the terms "nudity", "semi-nudity", and "simulated nudity" were held violative of the First Amendment. *See MD II Entm't, Inc. v. City of Dallas*, 935 F. Supp. 1394 (N.D. Tex. 1995) (*MD II(2)*), *aff'd,* 85 F.3d 624 (5th Cir. 1996) (per curiam; table). Among other things, the district court held: "no evidence indicate[d] that the drafters of the 1993 amendments *relied upon any studies* indicating [the amendments'] necessity or effectiveness", *id.* at 1397; and "no evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects", *id.* at 1398. In this light, the district court concluded that the challenged amendments were content-based and impermissible restrictions on protected expression. *Id.* at 1399.

In a one paragraph opinion, our court affirmed. It agreed with the district court's finding "'no evidence indicat[ing] that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects'". No. 95-10322 (5th Cir. 30 Apr. 1996) (per curiam; unpublished).

In the light of *MD II(2)*, the City consulted, and considered, data and studies concerning the deleterious secondary effects of SOBs, including: 1983, 1986, 1991, and 1997 studies by the City of Houston (Houston studies); a summary of land use studies compiled by the National Law Center for Children and Families; and 1994 and 1997 studies conducted, at the City's request, by the Malin Group (Malin studies).

The Malin Group reviewed studies completed by Austin, Los Angeles, Indianapolis, Phoenix, and New York (which found SOBs to have a variety of deleterious secondary effects, including increased crime rates, lowered property values, and the deterioration of community character and quality of life). In addition, the Malin Group studied the *secondary effects of SOBs in Dallas*.

The Dallas study compared a study area containing seven SOBs to two control areas, the first containing no SOBs and the second containing two SOBs located a half-mile apart but within 1000 feet of residential uses. After gathering data on a number of categories of crime, the study concluded that sex-related crime rates in the study area were more than three times higher than the city-wide average and five to ten times higher than in the control areas. In addition, the study found that, *inter alia,* properties in areas surrounding SOBs had lower values, were more difficult to lease, and remained on the market longer than in other areas.

The Malin studies did not consider whether the contested change in dancer attire (from pasties to bikini tops) would impact these deleterious secondary effects. Likewise, as Malin testified during a preliminary injunction hearing, the other studies his group had reviewed did not consider that question.

Beyond the mentioned studies, the City Plan Commission and City Council conducted four public hearings regarding SOBs and the proposed amendments. The City Zoning Ordinance Advisory Committee received public comment on the amendments. And, the City Council held at least six town hall meetings regarding SOBs and the proposed amendments.

In 1997, the ordinance at issue was enacted by the City: Ordinance 23137 (the Ordinance), which again amended Chapters 14 and 41A. The district court found:

> The enactment of [the] Ordinance . . . was a response to the City Council's expressed concern to better protect the public health, safety, and welfare, and was intended to address the deleterious secondary effects of [SOBs], and to enhance land use protection for residential areas and other surrounding areas.

Baby Dolls, 114 F.Supp.2d at 539.

The Ordinance eliminates the Chapter 14 Class D (SOB) dance hall classification and retains the definition of "sexually oriented business": "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center". But, it amends Chapter 41A-2 to read, in pertinent part:

> (3) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment that *as one of its principal business purposes* offers for sale or rental for any form of consideration any one or more of the following:
>
> > (A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations that depict or describe . . . *"specified anatomical areas"*. . . .
>
> (4) ADULT CABARET means a commercial establishment that *regularly features* the offering to customers of live entertainment that:
>
> > (A) is intended to provide sexual stimulation or sexual gratification to such customers; and
> >
> > (B) is distinguished by or characterized by *an emphasis on* matter depicting, simulating, describing, or relating to *"specified anatomical areas"*. . . .

. . . .

> (6) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are *regularly shown* that are

> *characterized by* the depiction or description of . . . *"specified anatomical areas."*
>
> . . . .
>
> (17) NUDITY or a STATE OF NUDITY means:
>
> (A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or
>
> (B) a state of dress that fails to completely and opaquely cover a human buttock, anus, male genitals, female genitals, or *any part of the female breast or breasts that is situated below a point immediately above the top of the areola.*
>
> . . . .
>
> (24) SPECIFIED ANATOMICAL AREAS means:
>
> (A) any of the following, or any combination of the following, when less than completely and opaquely covered:
>
> (i) any human genitals, pubic region, or pubic hair;
>
> (ii) any buttock; or
>
> (iii) *any portion of the female breast or breasts that is situated below a point immediately above the top of the areola. . . .*

(Emphasis added.) The amended definitions of "specified anatomical areas" and "nudity or a state of nudity" contain substantially the same language as had Ordinances 21837 and 21838 (1993), held in *MD II(2)* violative of the Constitution.

These amended definitions operate to classify Plaintiffs as SOBs (*i.e.*, adult cabarets). Accordingly, Plaintiffs must either comply with Chapter 41A's SOB location and licensing provisions or avoid SOB classification (and, therefore, remain at their current locations) by requiring their dancers to, *inter alia,* wear bikini tops.

In June 1997, Plaintiff Baby Dolls Topless Saloons, Inc., which had been *denied a SOB license* because of noncompliance with Chapter 41A's location provisions (the specific issue, discussed *infra,* concerned zoning to streets' center lines), brought this action as an as-applied challenge to its license denial. The district court permitted intervention by 11 other establishments which challenged the Ordinance on a variety of First and Fourteenth Amendment grounds and sought declaratory and injunctive relief. In March 1998, the court preliminarily enjoined the City from, *inter alia,* enforcing Chapter 41A against Plaintiffs through the amended definition of "specified anatomical areas".

Following a bench trial in September 1998, the district court entered judgment for the City in May 2000. In extremely detailed and comprehensive findings and conclusions, the court held: the City was not precluded from litigating the Ordinance's constitutionality, 114 F.Supp.2d at 542; the Ordinance was a content-neutral time, place, or manner regulation and satisfied the test for such regulations, *id.* at 544-49; the Ordinance is not overbroad, *id.* at 543-44; a related "no-touch" provision of Chapter 41A-18.1 is constitutional, *id.* at 549; and zoning residential districts to the center line of streets (which resulted in the denial of Baby Dolls' SOB license) was constitutional, *id.* at 542-43.

II.

Bench trial findings of fact are reviewed for clear error; conclusions of law, *de novo. E.g., Joslyn Mfg. Co. v. Koppers Co., Inc.,* 40 F.3d 750, 753 (5th Cir. 1994). Although numerous conclusions of law are challenged in this appeal, no findings of fact are. Our standard of review is further discussed with respect to each issue.

A.

Plaintiffs contend that, in the light of *MD II(2),* the City is collaterally estopped from litigating the Ordinance's constitutionality. Collateral estoppel *vel non* is a question of law reviewed *de novo. E.g., United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir.), *cert. denied,* 522 U.S. 934 (1997). In considering collateral estoppel, we decide whether

> (1) *the issue under consideration is identical to that litigated in the prior action;* (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) *there is no special circumstance that would make it unfair to apply the doctrine.*

Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 391 (5th Cir. 1998) (emphasis added; quoting *Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1422 (5th Cir. 1995)), *cert. denied,* 526 U.S. 1034 (1999). Here, the first and fourth prongs are of primary concern.

As noted, *MD II(2)* concerned the constitutionality of 1993 amendments to the definitions of nudity, semi-nudity, and simulated nudity to include "any part of the female breast below the top of the areola". The district court then held: as quoted earlier, "[n]o evidence indicates that the drafters of the 1993 amendments relied upon any studies indicating their necessity or effectiveness", 935 F.Supp. at 1397; "[n]o evidence indicates that the city conducted public meetings to consider any information regarding semi-nude dancing, deleterious secondary effects, or the relationship of the two", *id.* at 1398; and, as also quoted earlier, "no evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects", *id.* Accordingly, it held: the City had "*failed to show that a substantial governmental interest* was the predominant factor motivating it in enacting the amendments", *id.* at 1397 (emphasis added); and "the 1993 amendments [were] content-based restrictions on protected expression", *id.* at 1399. Accordingly, it awarded plaintiffs summary judgment. As stated, our court affirmed. 85 F.3d 624 (5th Cir. 1996) (per curiam; table).

For this action, in holding the City not estopped from litigating the constitutionality of the Ordinance (enacted in 1997), the district court concluded:

> The issue in this case is not "identical" [to that] in *MD II(2)* because this case presents the constitutionality of a[ ] different ordinance, which uses the same language as the unconstitutional ordinance in *MD II(2)*, that was enacted by the City *after considerable study and fact-finding, which were lacking in MD II(2)*.

Baby Dolls, 114 F.Supp.2d at 542. It also held that, per the fourth collateral estoppel prong, "the enactment of [the] Ordinance . . . after the City's fact-finding is a 'special circumstance' that makes the application of issue preclusion unfair". *Id.*

Plaintiffs maintain the merits-issue here is identical to that in *MD II(2)*. They characterize it as "whether the regulation of dancer attire through requiring the bottom half of a dancer's breasts to be covered is an impermissible *content-based* restriction". (Emphasis added.) Content-neutrality *vel non* is an issue in both cases, but only in a general sense. The content-neutrality *vel non* of a given ordinance is, as discussed below, a function of a city's predominant concern in enacting *that* ordinance, and the ordinance at issue here is not the same as was at issue in *MD II(2)*.

"[C]hanges in facts essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues". *Montana v. United States*, 440 U.S. 147, 159 (1979). As discussed, between *MD II(2)* and enactment of the Ordinance, the City conducted and reviewed studies, held public hearings, and took public comment on the proposed amendments and the SOBs' secondary effects. Plaintiffs may not agree that those activities are reasonably believed to be related to deleterious secondary effects of their establishments. But, that is a separate issue on the merits, to be answered in the light of the evidence that the City gathered and considered in enacting the Ordinance.

B.

"Whether . . . free speech rights have been infringed is a mixed question of law and fact [and t]he appropriate standard of review is de novo". *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge,* 876 F.2d 494, 496 (5th Cir. 1989) (citing *Dunagin v. City of Oxford,* 718 F.2d 738, 748 n.8 (5th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984)).

Plaintiffs maintain that, in reviewing their First Amendment challenge to the amended definition of "specified anatomical areas" (SAAs), the district court erred by applying the test for content-neutral time, place, or manner regulations set out in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). They assert: the Ordinance is not content-neutral because it "targets the essential expressive nature of the featured entertainment of the Cabarets' business"; and its "justification . . . was not shown to be related to the 'secondary effects' focus of the Ordinance". Under *Renton,* "zoning ordinances designed to combat the undesirable *secondary effects* of [SOBs] are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations". 475 U.S. at 49 (emphasis added). And, "findings of the [City] as to the secondary effects of sexually oriented businesses [can] satisfy us . . . that [its] predominant concern was with secondary effects and not the content of expression itself". *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1273 (5th Cir. 1988), *cert. denied,* 489 U.S. 1052 (1989). *SDJ, Inc.*, involved a similar zoning scheme that imposed location restrictions on establishments "characterized by an emphasis on matter depicting, describing or relating to . . . *specified anatomical areas*", defined as "[l]ess than completely and opaquely covered . . . [f]emale breast[s] . . . below a point immediately above the top of the areola". *Id.* at 1278 n.36 (emphasis added).

As noted, for the ordinance at issue here, the City commissioned studies and engaged in a series of public hearings, comment-taking, and town hall meetings regarding SOBs' deleterious effects. The City's concerns are adequately expressed in the Ordinance's preambulary language:

> WHEREAS, the provisions of *Chapter 14* governing Class A dance halls are *intended* to regulate businesses where *clothed* patrons dance and *not* businesses where *unclothed or scantily* clad dancers perform to provide *sexual stimulation and gratification to patrons;* and
>
> WHEREAS, the city council finds that such [latter] businesses operating as Class A dance halls under Chapter 14[, thereby avoiding Class D status and the concomitant location provision,] *are, in effect, [SOBs] and have the same harmful secondary effects on the surrounding community as the [SOBs] currently regulated under Chapter 41A;* . . .

. . . .

> WHEREAS, the city council finds that a concentration of [SOBs] continue[s] to contribute to a decline in the value of surrounding properties, to an increase in criminal activities in the surrounding community, and to urban blight and a downgrade in the quality of life in the surrounding community; . . .

. . . .

> WHEREAS, the city council believes that, to better protect the public health, safety, and welfare, it is *necessary to adopt additional amendments* to Chapter 41A that would enhance land use protection to residential areas and other surrounding areas; . . . restrict the location of [SOBs] near child-care facilities to protect the children that attend those facilities; and establish rules of conduct for certain [SOB] employees and customers. . . .

Dallas, Tex., Ordinance No. 23137 at 2-5 (emphasis added).

Plaintiffs maintain, however, that the evidence the City relied upon is irrelevant to the Ordinance. They reiterate one of the several earlier-quoted concerns of *MD II(2)*: "No evidence indicates that a requirement that all dancers wear bikini tops instead of pasties will reduce deleterious secondary effects". 935 F. Supp. at 1398-99. In this regard, Plaintiffs emphasize two of the district court's findings in the action at hand: "the Malin studies did not study whether a change in a dancer's attire from pasties to bikini tops would affect secondary effects"; and "Malin . . . testified that his studies indicated that the change in attire would not have an impact on secondary effects". *Baby Dolls*, 114 F. Supp. 2d at 540. According to Plaintiffs, there must be *specific* evidence linking bikini tops to reducing secondary effects.

Renton, however, does not require a "city to demonstrate[,] . . . with empirical data, that its ordinance will successfully lower crime", at least "not without actual and convincing evidence from plaintiffs to the contrary". *City of Los Angeles v. Alameda Books, Inc.*, 122 S. Ct. 1728, 2002 WL 970712, at *9 (U.S. 13 May 2002) (plurality). "Such a requirement would go too far in undermining [the] settled position that municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech". *Id.* (internal citations and quotation marks omitted).

> *Renton* teaches us that the government must produce *some* evidence of adverse secondary effects produced by . . . adult entertainment in order to justify a challenged enactment using the secondary effects doctrine. . . . *Renton* also instructs us that a government must present sufficient evidence to demonstrate "a link between the regulation and the asserted governmental interest," under a "*reasonable belief*" standard. . . .

J & B Entm't, Inc. v. City of Jackson, 152 F.3d 362, 371-72 (5th Cir. 1998) (emphasis added; quoting *Renton*, 475 U.S. at 51-52). Accordingly, we must determine whether, under this *reasonable belief* standard, the City's evidence demonstrates a *link* between its interest in combating secondary effects and the Ordinance.

That standard is satisfied. The Ordinance was enacted, in part, because the City had found that, through Chapter 14, entities that were, in effect, SOBs were avoiding that classification; and that concentrated SOBs "continue to contribute to . . . an increase in criminal activities in the surrounding community". Dallas, Tex., Ordinance 23137 (preamble). Among other relied-upon data, the 1997 Malin Study supports that increased-criminal-activities finding. From January 1993 through March 1997, there were 396 arrests for sex crimes ("Rape, Prostitution/Commercial Vice[,] and other Sex Offenses") in the study area (which included a concentration of seven SOBs), as compared to 133 such arrests in one control area (containing two SOBs located approximately a half-mile apart) and 77 such arrests in another control area (containing no SOBs).

In short, sex crime arrests were three to five times more frequent in the study area. While the Malin Study is careful not to attribute this disparity *entirely* to SOBs, it did find a correlation between SOBs – specifically, their "hours of operation and the type of people which SOBs attract" – and higher crime rates.

These findings are "*reasonably believed* to be relevant to the problem that the [C]ity addresses". *Renton*, 475 U.S. at 51-52 (emphasis added). The City relied upon specific evidence showing, *inter alia,* higher crime rates in the vicinity of SOBs. The City's attempts to deal with that reality had been continuously frustrated in the past, most recently by "exploitation of a 'loophole' in the City Code that permitted such businesses to avoid the location restrictions by obtaining dance hall licenses pursuant to Chapter 14, *which was not originally designed to regulate such businesses*". *Baby Dolls,* 114 F. Supp. 2d at 547 (emphasis added).

"[T]he Ordinance is a comprehensive amendment to Chapters 14 and 41A to carry out the City's *original intent in combating secondary effects associated with [SOBs]*". *Id.* (emphasis added). "[T]he evidence does not connect the wearing of bikini tops to the reduction of secondary effects", *id.*; but, in the light of the data considered by the City and other steps taken by it prior to enacting the Ordinance, it was not necessary to make that connection. Instead, it was reasonable for the City to conclude that establishments featuring performers in attire more revealing than bikini tops pose the same types of problems associated with other SOBs.

C.

Plaintiffs next contend that the amended definition of SAAs is overbroad because it will operate to classify a number of "mainstream" businesses (movie theaters, video stores, *and live theaters*) as SOBs (adult motion picture theaters, adult video stores, *and adult theaters*). The City, however, recently amended Chapter 41A-2 to *remove adult theaters* (theaters, auditoriums, concert halls, etc., featuring live entertainment) from the definition of SOBs. Dallas, Tex., Ordinance 24699 (22 Aug. 2001). As a result, we limit our overbreadth inquiry to whether the SAAs amended definition operates to classify "mainstream" movie theaters and video stores as "adult" motion picture theaters and video stores.

Facial overbreadth claims, being constitutional challenges, are reviewed *de novo*. *E.g., United States v. Stansell*, 847 F.2d 609, 612 (9th Cir. 1988). "[F]acial overbreadth adjudication is an exception to . . . traditional rules of practice". *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). It should be employed "sparingly, and only as a last resort". *Id.* at 613. "[W]here conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep". *Id.* at 615. The Ordinance is not facially overbroad.

With respect to movie theaters, Chapter 41A defines an *adult motion picture theater* as

> a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are *regularly* shown that are *characterized* by the depiction or description of . . . "[SAAs]."

Dallas, Tex., Code § 41A-2(6) (emphasis added). "Characterize" means "to describe *the essential* character or quality of". Webster's Third New International Dictionary 376 (1986) (emphasis added) (hereinafter Webster's). The chance that "mainstream" movie theaters will show films with depictions of SAAs *as their essential quality,* and will do so *regularly,* is highly improbable, as is the chance that they will be classified as "adult" motion picture theaters (and thus SOBs).

With respect to video stores, an *adult video store* is defined as

> a commercial establishment that *as one of its principal business purposes* offers for sale or rental for any form of consideration any one or more of the following . . . films, motion pictures, video cassettes or video reproductions, slides, or other visual representations that depict or describe . . . "[SAAs]".

Dallas, Tex., Code § 41A-2(3) (emphasis added). "Principal" is defined as "most important, consequential, or influential: relegating comparable matters [or] items . . . to secondary rank". Webster's 1802. The likelihood of a "mainstream" video store's falling within the definition of an "adult" video store, and thus of a SOB, is, as with movie theaters, highly improbable.

At any rate, if there is any real overbreadth in Chapter 41A, it is certainly not "substantial [when] judged in relation to [its] plainly legitimate sweep". *Broadrick*, 413 U.S. at 615. This understanding of the plain language of Chapter 41A-2, as amended, is confirmed by the limiting construction by the City Attorney post-enactment of the Ordinance and filing of this action. That limiting construction provides that businesses "which feature adult magazines, NC-17 or R-rated video tapes, and NC-17 or R-rated motion pictures", shall not be classified as SOBs by virtue of their featuring such products. Memorandum from City Attorney to Chief of Police 2-3 (5 June 1998). The City's Police Chief testified that his department relies on the limiting construction, and the City has an established history of not classifying mainstream businesses as SOBs.

"Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96 661 (1989) (quoting *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n.5 (1982)). The district court characterized the limiting construction as "preclud[ing] the classification of mainstream businesses as [SOBs] even if such businesses feature an article or activity that display[s] a [SAA]". *Baby Dolls*, 114 F. Supp. 2d at 543-44.

Plaintiffs maintain that *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), requires that "the limits the city claims are in its law *be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice*". *Id.* at 770 (emphasis added). That case concerned a city ordinance vesting the mayor with unfettered discretion to grant or deny applications from publishers for permits to place newsracks on public property. The Court noted that, in the area of free expression, a licensing scheme placing unbridled discretion with a public official amounts to a prior restraint, *id.* at 757, and held: *"[T]he doctrine forbidding unbridled discretion* . . . requires that the limits that the city *claims are implicit* in its law *be made explicit*", *id.* at 770 (emphasis added).

The Ordinance does not vest unbridled discretion in the City or in any City official. It is not a prior restraint. As the Court noted in *Plain Dealer Publishing*, it would "presume any narrowing construction or practice to which the law is 'fairly susceptible'". *Id.* at 770 n.11; *see also Broadrick,* 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been *or could be* placed on the challenged statute." (Emphasis added.)).

D.

Plaintiffs next contend the district court erred in holding that, as applied, the following "no touch" provision is not an unconstitutional, content-based restriction on speech. The provision provides:

> (a) An *employee* of an adult cabaret, while exposing any [SAAs], commits an offense if the employee touches a customer or the clothing of a customer.
>
> (b) A *customer* at an adult cabaret commits an offense if he touches an employee who is exposing

> any [SAAs] or touches the clothing of the employee.

Dallas, Tex., Code § 41A-18.1 (emphasis added). Again, free speech claims present a mixed question of law and fact, reviewed *de novo. E.g., Int'l Soc'y for Krishna Consciousness,* 876 F.2d at 496. As the district court noted, *see Baby Dolls,* 114 F. Supp. 2d at 549, our court held in *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1253 (5th Cir. 1995) (first emphasis added):

> [I]ntentional contact between a nude dancer and a . . . patron is conduct beyond the expressive scope of the dancing itself. *The conduct at that point has overwhelmed any expressive strains it may contain.* That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment. . . .

Similarly, *patrons* have no First Amendment right to touch a nude dancer.

Hang On concerned a facial challenge to a provision almost identical to the one at issue here. *See id.* at 1251.

Plaintiffs point to the fact that the SOB in *Hang On* did not offer evidence of the expressive nature of touch in the course of a "table" or "lap dance" ("which involves contact between the dancer, while exposing [SAAs], and the customer", *Baby Dolls*, 114 F. Supp. 2d at 541). Plaintiffs, on the other hand, did provide the following testimony by one of their witnesses (a cultural anthropologist) that innocuous touch between a dancer and patron communicates a distinct message: "concern, affection, caring and . . . eliminat[ion of] the sense of distance and coldness[;] the message that the dancers really want to get across . . . is the man is king for the moment, as it were". They contend: "Touch is an essential element of 'private dance' expression".

Hang On did *not* hold that such innocuous touch may contain unique, *expressive* elements. Instead, as emphasized in the above-quoted passage, it held: "The conduct at that point [intentional contact] has overwhelmed *any expressive strains* it *may* contain". *Id.* at 1253 (emphasis added). Restated, that holding did not turn on evidence *vel non* presented by an SOB. It controls here.

E.

Finally, Plaintiff Baby Dolls appeals the denial of its SOB permit (and, previously, one for Class D) because its proposed location was within 1000 feet of a freeway, which is zoned a residential district. The district court noted: a zoning regulation is ordinarily constitutional so long as there is "any possible rational basis" for it, *SDJ, Inc.*, 837 F.2d at 1273 (quoting *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986) (en banc)); the zoning of the freeway as a residential district was consistent with the City's Development Code and historical zoning practices; and, most importantly, the zoning classification "*predates* the existence of [SOBs] and was *not motivated* to restrict any form of expression". *Baby Dolls*, 114 F. Supp. 2d at 543 (emphasis added). Accordingly, and citing *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 (1990), the district court held: "[T]he classification is a content-neutral, generally applicable law that does not violate the First Amendment even if it incidentally burdens [Baby Dolls'] protected expression". *Baby Dolls*, 114 F. Supp. 2d at 543.

Baby Dolls maintains the district court "misconstrued the First Amendment claim as being a challenge to the City's policy of zoning to the middle of the street". "What is properly to be evaluated", according to Baby Dolls, "is the application of [the] one thousand (1000) foot distance restriction from residentially zoned property when that property is a freeway and there is no likelihood of residential use". In that light, Baby Dolls urges us to apply the four-part test for incidental limitations on expressive conduct set out in *United States v. O'Brien*, 391 U.S. 367 (1968).

Even if we accept Baby Dolls' framing of the appropriate inquiry and review its claim *de novo,* its contention fails. "Regulations that burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their *general* effect." *United States v. Albertini,* 472 U.S. 675, 688-89 (1985) (emphasis added; citation omitted). "The First Amendment does not bar application of a *neutral regulation* that incidentally burdens speech merely because a party contends that allowing an exception *in the particular case* will not threaten important government interests." *Id.* at 688 (emphasis added; citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984)).

III.

For the foregoing reasons, the judgment is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

BABY DOLLS TOPLESS SALOONS, INC., d/b/a BABY DOLLS SALOON-EAST	§ § §	
Plaintiff,	§	**CIVIL ACTION NO. 3:97-CV-1331-R**
MD II ENTERTAINMENT, INC., d/b/a THE FARE WEST, and D. BURCH, INC., d/b/a BABY DOLLS TOPLESS SALOON,	§ § § § §	
Intervenors,	§	
MAINSTAGE, INC., d/b/a P.T.'s GENTLEMEN'S CLUB; CLUB HOSPITALITY, INC., d/b/a CLUB LIPSTICK; FRANK SMITH, d/b/a SHEER D'LITE; OGC RESTAURANTS, L.L.C., d/b/a OBSESSIONS; SANTA FE CABARET, L.L.C., d/b/a SANTA FE CABARET; and CASE AND POINT, INC., d/b/a BARE FACTS,	§ § § § § § § § § § § §	
Intervenors,	§	
DIMITRI PAPATHANSIOU, d/b/a DOLL'S HOUSE; TOM K. LAZANAS, d/b/a BABY G'S and d/b/a FACES; and VJAC INVESTMENTS, INC., d/b/a VENUS,	§ § § § § §	
Intervenors	§	

v. §
§
CITY OF DALLAS, §
Defendant. §

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 2, 2000)

Plaintiff Baby Dolls Topless Saloons, Inc. d/b/a Baby Dolls Saloon-East and Intervenors MD II Entertainment, Inc. d/b/a The Fare West; D. Burch, Inc. d/b/a Baby Dolls Topless Saloon; Mainstage, Inc. d/b/a P.T.'s Gentlemen's Club; Club Hospitality, Inc. D/b/a Club Lipstick; Frank Smith d/b/a Sheer D'Lite; OGC Restaurants, L.L.C. d/b/a Obsessions; Santa Fe Cabaret, L.L.C. d/b/a Santa Fe Cabaret; Case and Point, Inc. d/b/a The Bare Facts; Dimitri Papathansiou d/b/a Doll's House; Tom K. Lazanas d/b/a Baby G's and d/b/a Faces; and VJAC Investments, Inc. d/b/a Venus brought this action against Defendant City of Dallas ("the City") alleging that Dallas City Code Chapter 41A, as amended by City Ordinance No. 23137 ("the Ordinance"), violates their rights protected by the First and Fourteenth Amendments to the Constitution, and seeking declaratory and injunctive relief. The Court partially granted injunctive relief for Intervenors on March 2, 1998. The injunction enjoined Defendant from enforcing Chapter 41A, as amended by the Ordinance, against Intervenors through the amended definition of "specified anatomical areas" in §§ 41A-2(3), (4), (6), and (7). The Court also enjoined Defendant from enforcing the amended amortization requirements of §§ 41A-13(f)-(i) against certain Intervenors. The Court denied all other requests for injunctive relief.

The Court tried this action without a jury on September 8-10, 14, and 15, 1998. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court makes its findings of fact and conclusions of law as follows:

I. FINDINGS OF FACT

A. Preliminary Findings

1. Plaintiff and Intervenors operate nightclubs that present live entertainment consisting of female striptease and topless dancing at various locations in the City of Dallas, Texas.

2. The City is a home-rule city within Dallas County, Texas.

3. In 1986, the City enacted Chapter 41A of the Dallas City Code as a comprehensive zoning and licensing regulation for "sexually oriented businesses." The purpose of Chapter 41A was "to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city." DALLAS CITY CODE § 41A-1. The City enacted Chapter 41A after studying the efforts of other cities in regulating such businesses. Chapter 41A originally defined "sexually oriented business" as follows:

> SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

Ch. 41A-2(17) (1986). An "adult cabaret" was defined as

> ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:
>
> (a) persons who appear in a state of nudity; or
>
> (b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or
>
> (c) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

Id. § 41A-2(3) (emphasis added). "Specified anatomical areas" was defined as

> SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

Id. § 41A-2(18). "Nudity or a state of nudity" was defined as

> NUDITY or a STATE OF NUDITY means the appearance of a bare buttock, anus, male genitals, female genitals, or female breast.

Id. § 41A-2(13). Also among the regulations was a requirement that a sexually oriented business be at least 1,000 feet from another sexually oriented business, a church, a school, a residential area, or park. *See id.* § 41A-13. The above definitions and the location restrictions were held to be constitutional by this Court and the U.S. Court of Appeals for the Fifth Circuit. *See Dumas v. City of Dallas,* 648 F. Supp. 1061 (N.D. Tex. 1986) (Buchmeyer, J.), *aff'd sub nom. FW/PBS, Inc. v. City of Dallas,* 837

F.2d 1298 (5th Cir. 1988), *aff'd in part, rev'd in part on other grounds,* 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990).

4. In light of these decisions, a sexually oriented business that sought to continue offering female striptease and topless dancing could either relocate to a site that complied with Chapter 41A and be licensed as a sexually oriented business, or change their dancers' attire to "simulate" nudity, and be licensed as a "dance hall" under Dallas City Code Chapter 14 – which did not, and wasn't designed to, regulate sexually oriented businesses – and remain at their existing locations. This was possible because the definition of nudity in Chapter 41A did not include "simulated" nudity. *See supra* Findings of Fact ¶ 3 [hereinafter FOF]. Most of Intervenors' businesses chose to change their dancers' attire by requiring them to simulate nudity by wearing flesh-colored pasties over their areolae and bikini bottoms. This allowed Intervenors' businesses to avoid being regulated as a sexually oriented business under Chapter 41A, to obtain theater or dance hall licenses pursuant to Chapter 14, and to operate at their existing locations.

5. On January 22, 1992, the City enacted Ordinance No. 21184 amending Chapter 14 to create a new classification of dance halls, "Class D Dance Halls." The City enacted Ordinance No. 21184 because Intervenors' businesses had found a way to circumvent the intent of Chapter 41A and to avoid its location restrictions by featuring semi- or simulated nudity. *See* Ints. Ex. 290 at 4. By creating Class D Dance Halls, the City sought to prevent Intervenors' businesses from operating as a theater or dance hall and to subject them to location restrictions

similar to those imposed by Chapter 41A. *See id.* Ordinance No. 21184 contained the following relevant definitions:

> (5) CLASS D DANCE HALL means any place:
>
> (A) where dancing is permitted one day a week or more by a person in a state of semi-nudity or simulated nudity;
>
> . . .
>
> (14) SEMI-NUDITY means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and areolae of the female breast, as well as parts of the body covered by supporting straps or devices.
>
> (15) SIMULATED NUDITY means a state of dress in which any device or covering, exposed to view, is worn that simulates any part of the genitals, buttocks, public region, or areolae of the female breast.

DALLAS CITY ORDINANCE NO. 21184. Ordinance No. 21184 provided an eighteen-month amortization period in which businesses not conforming to the location restrictions could comply with the new requirements. Ordinance No. 21184 also required Intervenors' businesses to comply with various advertising regulations. The City issued to most Intervenors' businesses Class D Dance Hall licenses valid for their existing locations until the end of the amortization period on July 22, 1993.

6. This Court, in *MD II Entertainment, Inc. v. City of Dallas,* Civ. A. No. 3:92-CV-1090-H, 1993 WL 227774 (N.D. Tex. Apr. 15, 1993) (Sanders, C.J.) [hereinafter *MD II(1)*], *aff'd,* 28 F.3d 492 (5th Cir. 1994), found Ordinance No.

21184's advertising requirements unconstitutional. However, the Court also found that Ordinance No. 21184's location restrictions and the definition of simulated nudity did not violate the First Amendment. The Court also did not address the constitutionality of the ordinance's definition of semi-nudity. *See id.* at *3n.9.

7. In response to Judge Sanders' decision in *MD II(1),* most Intervenors applied for and obtained a "Class A Dance Hall" license under Chapter 14. To obtain Class A Dance Hall licenses, Intervenors businesses again restructured their operations by requiring their dancers to wear non-flesh colored, opaque pasties to cover their areolae, and bikini bottoms substantially covering their buttocks and pubic area. Such licenses were for one year only, but were subject to renewal.

8. On October 13, 1993, the City enacted Ordinance No. 21837 amending Chapters 14 and 41A "because certain businesses[, such as Intervenors',] featuring adult entertainment found a way to circumvent the locational restrictions set forth in Chapters 14 and 41A." Specifically, the City found that

> To avoid locational restrictions, female dancers had replaced their flesh-colored latex pasties with contrasting colored pasties that covered a little more than the areola of the breasts. This modification in the dancers' attire removed the clubs from coming under the definitions of semi-nudity or simulated nudity, and allowed them to operate under a Class A dance hall license, without additional restrictions.

See Ints. Ex. 290 at 5. Ordinance No. 21837 included the following relevant definitions:

> NUDITY or a STATE OF NUDITY means:
>
> (A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or
>
> (B) a state of dress that fails to opaquely cover a human buttock, anus, male genitals, female genitals, or *any part* of the female breast *below the top of the areola.* (additions underlined)
>
> SEMI-NUDITY means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and *any part* [~~areolae~~] of the female breast *below the top of the areolae,* as well as parts of the body covered by supporting straps or devices.
>
> SIMULATED NUDITY means a state of dress in which any device or covering, exposed to view, is worn that simulates any part of the genitals, buttocks, pubic region, or *any part* of the female breast *below the top of the areola.* (additions underlined)

Dallas City Ordinance No. 21837 § 2(14) (Oct. 13, 1993). These amendments were made to ensure that all businesses featuring adult entertainment complied with the locational restrictions set forth in Chapters 14 and 41A. *See* Ints.' Ex. 290 at 6. "The mere use of contrasting colored pasties and bikini-bottoms by the dancers would no longer exclude the clubs from the licensing and locational restrictions applicable to Class D dance halls and S.O.B.'s." *Id.* In effect, the ordinance required businesses like Intervenors' to change their dancers attire by making them wear bikini tops if the businesses wished to avoid being classified as sexually oriented businesses and remain in their existing locations.

9. In *MD II Entertainment, Inc. v. City of Dallas,* 935 F. Supp. 1394 (N.D. Tex. 1995) (Maloney, J.) [hereinafter *MD II(2)*], *aff'd,* 85 F.3d 324 (5th Cir. 1996) (per curiam) (table), this Court held that Ordinance No. 21837's amendments to the terms "nudity," "semi-nudity," and "simulated nudity" violated the First Amendment as content-based restrictions on expression. In reaching this decision, Judge Maloney held that the City had not shown that it had a substantial interest in curbing deleterious secondary effects associated with semi-nude dancing offered by businesses such as Intervenors' to justify the amendments. *See MD II(2),* 935 F. Supp. at 1397. Judge Maloney also stated that "no evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." *Id.* at 1398. Because the City had not supported the amendments with any findings indicating that the amendments were necessary or that there was a causal connection between the amendments and secondary effects of semi-nude dancing, Judge Maloney concluded that the amendments were content-based, and impermissibly restricted the plaintiffs' constitutionally protected expression. *See id.* On appeal, the Fifth Circuit affirmed Judge Maloney in an unpublished, per curiam decision stating that "[w]e agree that 'no evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects.'" *MD II Entertainment, Inc. v. City of Dallas,* No. 95-10322 (5th Cir. Apr. 30, 1996) (slip op.) (per curiam).

10. On May 28, 1997, the City enacted Ordinance No. 23137 ("the Ordinance") amending Chapters 14 and 41A. Importantly, Ordinance No. 23137 amends Chapters 14 and 41A by eliminating the classification of Class D

Dance Halls, redefining terms classifying sexually oriented businesses, restricting the location of sexually oriented businesses near child-care facilities, providing restrictions for nude model studios and adult cabarets relating to physical contact between employees and customers and customer access to closed areas within those establishments, and providing for the amortization of nonconforming sexually oriented businesses. *See* DALLAS CITY ORDINANCE NO. 23137 at 1. The relevant provisions of Ordinance No. 23137 amend Chapter 41A as follows:

> SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center. Dallas City Code § 41A-2(22).
>
> ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment that as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:
>
> (A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations that depict or describe "specified sexual activities" or "specified anatomical areas"; or
>
> (B) instruments, devices, or paraphernalia that are designed for use in connection with "specified sexual activities." *Id.* § 41A-2(3).
>
> ADULT CABARET means a commercial establishment that regularly features the offering to customers of live entertainment that

(A) is intended to provide sexual stimulation or sexual gratification to such customers; and

(B) is distinguished by or characterized by an emphasis on matter depicting, simulating, describing, or relating to "specified anatomical areas" or "specified sexual activities." *Id.* § 41A-2(4).

ADULT MOTEL means a hotel, motel, or similar commercial establishment that

(A) offers accommodations to the public for any form of consideration provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other pornographic reproductions that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way that advertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours. *Id.* § 41A-2(6).

ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown that are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." *Id.* § 41A-2(6).

ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment that regularly features persons who appear in a state of nudity or live performances that are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities." *Id.* § 41A-2(7).

SPECIFIED ANATOMICAL AREAS means:

(A) any of the following, or any combination of the following, when less than completely and opaquely covered:

(i) any human genitals, pubic region, or pubic hair;

(ii) any buttock; or

(iii) any portion of the female breast or breasts that is situated below a point immediately above the top of the areola; or

(B) human male genitals in a discernibly erect state, even if completely and opaquely covered. *Id.* § 41A-2(24).

SPECIFIED SEXUAL ACTIVITIES means and includes any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in

Paragraphs (A) through (C) of this subsection. *Id.* § 41A-2(25).

NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(B) a state of dress that fails to completely and opaquely cover a human buttock, anus, male genitals, female genitals, or any part of the female breast or breasts that is situated below a point immediately above the top of the areola. *Id.* § 41A-2(17).

11. The amended definitions of "sexually oriented business," "adult cabaret," and "specified anatomical areas" operate to classify Intervenors' businesses as sexually oriented businesses – i.e., adult cabarets – subject to location restrictions specified in § 41A-13. Intervenors' businesses now must comply with the location restrictions of § 41A-13 and obtain a sexually oriented license per § 41A-4. However, Intervenors' businesses can also avoid being classified as adult cabarets if their dancers perform in bikini tops to cover their areolae, and remain at their existing locations.

12. The amended definitions of "specified anatomical areas" and "nudity or a state of nudity" contain the same language that this Court found unconstitutional in *MD II(1)*.

B. Findings Relating to Plaintiff's Claims

13. Plaintiff's application for a Class D Dance Hall license to operate Baby Dolls Saloon East, an adult

cabaret, at 9505 East R.L. Thornton Freeway ("the Freeway") was denied by the City on May 13, 1997, because the proposed location was within 1,000 feet of a boundary of a residential district, namely R.L. Thornton Freeway. *See* Ints.' Exs. 20, 95. Plaintiff's application for a sexually oriented business license to operate Baby Dolls Saloon East at the same proposed location was also denied by the City on June 23, 1997, for the same reason. *See* Ints.' Exs. 21, 95.

14. As a matter of policy, the City generally zones to the middle of a street or highway. *See* DALLAS CITY CODE § 51A-4.104. However, when a street or highway is the border between Dallas and another city, the City has sometimes extended the zoning line to the city limit line. John Kimbrough, a senior zoning planner for the City's Department of Planning and Development, testified that no City ordinance, regulation, policy, or custom requires such extension of the zoning line to the city limit line. Mr. Kimbrough also testified that the reason why some zoning lines were extended to the city limit line is because of historical changes in zoning districts, acquisition or sale of property and the resulting changes in zoning therefrom, and mapping errors. The Court credits Mr. Kimbrough's testimony on these findings.

15. Plaintiff's proposed location is precluded because it is within 1,000 feet of a residentially zoned district. To clarify, to the south of the proposed location is the zone line marked by R.L. Thornton Freeway. *See* Ints.' Ex. 95. To the east of the proposed location is the zone line marked by a commercial district zoned as "limited office district," or LO-1. *See id.* However, immediately south of the LO-1 district is an "R-7.5(A)" residential district, which is a classification for large areas of undeveloped

land appropriate for single-family use. *See* DALLAS CITY CODE § 51A-4.112(f). Because R.L. Thornton Freeway separates the LO-1 and R-7.5(A) districts, and because the City zones to the center line of a highway if it is the border of a zoning district, the City has zoned property north of the Freeway's center line as LO-1, and property south of the Freeway's center line as R-7.5(A). If the LO-1 zoning district were extended south to the border of the City of Mesquite, the LO-1 district would supplant the R-7.5(A) district, and Plaintiff's proposed location would constitute a conforming use under City Code § 41A-13 because it would not be within 1,000 feet of a residential use. However, because the City has not done so, the classification of the Freeway as an R-7.5(A) residential zoning district precludes Plaintiff's use of the proposed location as a sexually oriented business because the proposed location is 479 to 807 feet from the center line of the Freeway.

16. The Court finds, based on Mr. Kimbrough's testimony, that the City's classification of R.L. Thornton Freeway as an R-7.5(A) residential zoning district is consistent with the City's Development Code and historical zoning practices. Although the City has in other areas classified or extended a zoning line to the city limit line, the Court finds, based on Mr. Kimbrough's testimony, that the City's zoning of the LO-1 district to the center line of R.L. Thornton Freeway is also consistent with the City's Development Code and historical zoning practices.

C. Findings Relating to Intervenors' Claims

17. The enactment of Ordinance No. 23137 was a response to the City Council's expressed concern to better protect the public health, safety, and welfare, and was

intended to address the deleterious secondary effects of sexually oriented businesses, and to enhance land use protection for residential areas and other surrounding areas. *See* DALLAS CITY ORDINANCE NO. 23137 at 2-5; Def.'s Exs. 2-9, 13.

18. Prior to the enactment of Ordinance No. 23137 the Dallas City Council received and considered information concerning the deleterious secondary effects of sexually oriented businesses contained in the 1983, 1986, 1991, and 1997 City of Houston studies, the 1994 and 1997 Malin Group studies, and the summary of land use studies compiled by the National Law Center for Children and Families. *See* DALLAS CITY ORDINANCE NO. 23137 at 2-3; Def.'s Exs. 1-9, 14, 17-20. The studies by Houston and the National Law Center for Children and Families concluded that sexually oriented businesses have adverse secondary effects on surrounding communities involving property values, crime, and quality of life. *See* Def.'s Exs. 4-9. In support of this finding the Court also credits the testimony of Peter Malin, the City's expert, Kathleen Leos, Dallas Independent School District Trustee, and Cherryl Peterman, the City's Director of Planning, who testified to the existence of a connection between Intervenors' businesses and harmful secondary effects on their surrounding communities.

19. Prior to the enactment of Ordinance No. 23137 the City also engaged in the following fact-finding activities:

> a. The City Plan Commission conducted open public hearings on March 20 and April 3, 1997, regarding sexually oriented businesses and the proposed amendments to Chapters 14 and 41A. *See* Def.'s Ex. 11; Peterman Testimony.

b. The City's Zoning Ordinance Advisory Committee ("ZOAC") received public comment at its March 27, 1997, meeting regarding sexually oriented businesses and the proposed amendments to Chapters 14 and 41A. *See* Def.'s Ex. 10. The ZOAC approved the amendments by a 6-0 vote. *See id.*

c. The City Council held at least six town hall meetings regarding sexually oriented businesses and the proposed amendments to Chapters 14 and 41A. *See* Def.'s Ex. 14.

d. The City Council conducted public hearings on May 14, 1997, and May 28, 1997, regarding the proposed amendments to Chapters 14 and 41A. At these hearings citizens came forward to express their opinions for and against the proposed amendments. *See* Def.'s Exs. 12-14; Peterman Testimony; Leos Testimony.

20. In 1997, the City retained the Malin Group to conduct a study that updated its original 1994 study on the secondary effects of sexually oriented businesses. *See* Def.'s Exs. 2-3; Malin Testimony. The 1994 and 1997 studies show that the continued concern of the City regarding harmful secondary effects created by sexually oriented businesses remains justified. *See id.* Both studies reaffirmed the original findings made by the City in 1986 that sexually oriented businesses cause harmful secondary effects on the surrounding community, and that such effects are the same whether the business is featuring dancers in a state of nudity or semi-nudity because the public perception is the same. *See id.* The studies reviewed studies of adult entertainment completed by Austin, Los Angeles, Indianapolis, Phoenix, and New York, and concluded that these studies found that sexually oriented

businesses have negative secondary effects, such as increased crime rates, depreciation of property values, deterioration of community character, and deteriorating quality of life. *See id.*

21. The Malin Group also studied secondary effects in Dallas. *See id.;* Malin Testimony. The Malin Group study created a study area consisting of seven sexually oriented businesses and compared the area with two control areas that did not have any such businesses or had such businesses separated at least 1,000 feet apart. *See* Def.'s Ex. 2 at 6. The studies gathered data on property values and crime, specifically rape, prostitution, murder, burglary, assault, theft, and robbery, in the surrounding communities. *See id.* at 6, 14. The study found that sex-related crimes were over three times higher in the study area than the citywide average, and five to ten times higher than in the control areas. *See id.* at 14. This result was similar to a study conducted by the Dallas Police Department before the enactment of Chapter 41A in 1986. *See id.* The study also showed that in the community surrounding the sexually oriented businesses the property values were lower, the length of time prior to property sales were higher, and the properties located near such businesses were harder to lease. *See id.* at 12.

22. However, the Malin studies did not study whether a change in a dancer's attire from pasties to bikini tops would affect secondary effects. *See* Def.'s Exs. 2-3; Malin Testimony. Mr. Malin also testified that his studies indicated that the change in attire would not have an impact on secondary effects.

23. The amended definition of "specified anatomical areas" does not extend the definitions of "adult bookstore,"

"adult video store," and "adult motion picture theater" to include bookstores, video stores, and motion picture theaters that feature NC-17, R, and PG-13 rated films or video tapes containing nudity that display specified anatomical areas. The City's interpretation of specified anatomical areas, adult bookstore, adult video store, and adult motion picture theater as indicated by the City Attorney's memorandum to the Dallas Police Department would specifically exclude films or video tape rated NC-17, R, or PG-13 containing nudity from the category of material considered to be "characterized by the depiction or description of" specified anatomical areas or specified sexual activities as defined in the Ordinance. *See* Def.'s Ex. 24. The Court also credits the testimony of Dallas Police Department Assistant Chief John Holt, and Detectives Paul Ronyak, and Steve Foster in making this finding.

24. In 1987, the City enacted the Dallas Development Code, *see generally* DALLAS CITY CODE § 51A, which established a new zoning code for the City revamping the zoning landscape by eliminating cumulative zoning. Chapter 51A rezoned each piece of property in the City, resulting in less areas available for sexually oriented businesses.

25. There are within the City 80-90 available sites for Intervenors and others seeking to engage in sexually oriented businesses. The City contended that there were 244 available sites, whereas Intervenors claimed that there were only 50. *See* Def.'s Ex. 21; Robert Reeves Testimony; Ints. Ex. 45; Michael Coker Testimony. While the actual number of such sites cannot be reduced to a precise figure, upon review of the reports and testimony of Michael Coker, Intervenors' expert, and Robert Reeves, the

City's expert, the Court finds that there are at least 80-90 sites within the City for the 18-22 sexually oriented businesses that may be forced to relocate because of the Ordinance. *See also* Def.'s Exs. 15, 16, 21, 22.

26. The City has generally issued sexually oriented business licenses when the applicants meet the criteria set forth in Chapter 41A. *See* Holt Testimony; Ronyak Testimony.

27. During 1991-1997, 41% of applications filed by sexually oriented businesses seeking exemptions from Chapter 41A's location restrictions have been granted by the City's Permit and License Appeal Board ("PLAB"). *See* Def.'s Exs. 25-30. In making this finding, the Court also credits the testimony of Assistant City Secretary Barry Davis, Steve Craft, and Officers Ronyak and Foster.

28. The City has appointed to the PLAB individuals who have openly expressed hostility towards sexually oriented businesses regardless of whether they are licensed or exempted, and whose credibility and impartiality as a member of the PLAB is highly questionable. *See* Craft Testimony. Specifically, Jim Williams and Judy McCoy, as members of the PLAB, have served on PLAB panels that never granted a location or late hours exemption for a sexually oriented business applicant. *See id.;* Ints.' Ex. 55.

29. The City has permitted ex parte contacts between members of the PLAB and the board of adjustment and various community organizations and individuals, including members of the City Council, seeking to shut down sexually oriented businesses. *See* Craft Testimony; Elias Martinez Testimony. Such contacts have resulted in the denial of an exemption or license and the reduction of

amortization periods for sexually oriented businesses. *See* Craft Testimony; Martinez Testimony; Ints.' Ex. 252.

30. The City had originally allowed Intervenor Baby Dolls Topless Saloons, Inc. d/b/a Baby Dolls Topless-West an amortization period of 13 years to recoup its investment under Chapter 41A, but later reduced that period to 90 days at the direction of the City Attorney and the City Council. *See* Martinez Testimony; Craft Testimony.

31. Intervenors' businesses feature table or lap dancing, which involves contact between the dancer, while exposing specified anatomical areas, and the customer. *See* Dr. Judith Hanna Testimony; Hillary Milkovich Testimony.

32. The City, through the testimony of Chief Holt, Detectives Ronyak and Foster, and Officer Michael McMurray, established that public lewdness and other crimes sometimes occur in sexually oriented businesses as a result of touching or groping by dancers and customers. They also testified that such occurrences require continued investigation and monitoring of sexually oriented businesses by the City.

II. CONCLUSIONS OF LAW

A. Preliminary Conclusions

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 42 U.S.C. § 1983.

2. The City is not precluded from litigating the constitutionality of the Ordinance. Under the judicial doctrine of collateral estoppel, or issue preclusion, a prior judgment is given preclusive effect to a subsequent

litigation if "(1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine." *Texas Office of Pub. Util. Counsel v. Federal Communications Comm'n,* 183 F.3d 393, 435 n.75 (5th Cir. 1999) (citing *Winters v. Diamond Shamrock Chem. Co.,* 149 F.3d 387, 391 (5th Cir. 1998), *cert. denied,* 526 U.S. 1034, 119 S. Ct. 1286, 143 L. Ed.2d 378 (1999)). The issue in this case is not "identical" as in *MD II(2)* because this case presents the constitutionality of an different ordinance, which uses the same language as the unconstitutional ordinance in *MD II(2),* that was enacted by the City after considerable study and fact-finding, which were lacking in *MD II(2).* Even if the issue here is "identical" and even assuming that the issue was fully litigated and necessary to support the judgment in the prior case, the Court concludes that the enactment of Ordinance No. 23137 after the City's fact-finding is a "special circumstance" that makes the application of issue preclusion unfair. *See Deweese v. Town of Palm Beach,* 688 F.2d 731, 734 (11th Cir. 1982) (refusing to give preclusive effect to a prior state court judgment declaring a Palm Beach ordinance banning jogging without a shirt as unconstitutional to a subsequent amendment of the ordinance). Were the Court to accept Intervenors' argument, the City would be forever barred from enacting an ordinance that contained the amended definitions, a result that would be unfair if the facts justifying such amendments were to occur.

B. Conclusions Relating to Plaintiff's Claims

3. Plaintiff has standing to make an as-applied challenge to the application of the City's zoning of R.L. Thornton Freeway as a residential district to deny Plaintiff's applications for Class D Dance Hall and sexually oriented business licenses. *See Dumas,* 648 F. Supp. at 1068 (" 'It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought.' ") (quoting *Fernandes v. Limmer,* 663 F.2d 619, 625 (5th Cir. 1981)). Plaintiff's claim is also ripe for adjudication. *See id.*

4. The City's classification of R.L. Thornton Freeway as a residential zoning district, and the City's denial of Class D Dance Hall and sexually oriented business licenses for Plaintiff's proposed location is constitutional. Ordinarily, a zoning regulation is constitutional if "there was any possible rational basis for legislation." *SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1273 (5th Cir. 1988) (internal quotation marks omitted) (citing *Shelton v. City of College Station,* 780 F.2d 475, 479 (5th Cir.) (en banc), *cert. denied,* 477 U.S. 905, 107 S. Ct. 89, 93 L. Ed. 2d 41 (1986)). Because the City's zoning of R.L. Thornton Freeway as an R-7.5(A) residential zoning district is consistent with its Development Code and historical zoning practices, the classification of R.L. Thornton Freeway as a residential zoning district has a rational basis, and does not violate Plaintiff's due process rights protected by the Fourteenth Amendment.

5. Moreover, the classification of the Freeway as a residential district does not violate Plaintiff's First Amendment rights. The classification predates the existence of sexually oriented businesses and was not

motivated to restrict any form of expression, especially Plaintiff's. Thus, the classification is a content-neutral, generally applicable law that does not violate the First Amendment even if it incidentally burdens Plaintiff's protected expression. *See Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 882, 110 S. Ct. 1595, 1602, 108 L. Ed. 2d 876 (1990). In consequence, there is no need to utilize a higher level of scrutiny and analyze whether the classification is justified as a time, place, and manner regulation. Plaintiff's claim that the classification violates its protected expression fails as a matter of law.

C. Conclusions Relating to Intervenors' Claims

6. Plaintiff and Intervenors allege that the Ordinance's definitions of specified anatomical areas and nudity or a state of nudity are overbroad because they have the effect of classifying any motion picture theater, theater, video store, book store, motel, newsstand, modeling and photography studio, lingerie store, or any other "mainstream business" that displays or depicts specified anatomical areas as a sexually oriented business. Additionally, Plaintiff and Intervenors claim that the amended definition of nudity or a state of nudity is overbroad because their businesses may now be classified as adult theaters or nude modeling studios.

7. A litigant may mount a constitutional attack against a statute by alleging that it is overbroad under the First Amendment, that is, a statute may be unconstitutionally overbroad if the existence of the statute "may

cause others not before the court to refrain from constitutionally protected expression." *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S. Ct. 2908, 2916 (1973). However, "facial overbreadth adjudication is an exception to . . . traditional rules of practice and . . . where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well." *J & B Entertainment, Inc. v. City of Jackson,* 152 F.3d 362, 366 (5th Cir. 1998) (quoting *Broadrick,* 413 U.S. at 615, 93 S. Ct. at 2917) (internal quotation marks omitted) (second and third alterations in original). Moreover, a statute is not facially overbroad "when a limiting construction has been or could be placed on the challenged statute." *Broadrick,* 413 U.S. at 613, 93 S. Ct. at 2916.

8. Under the above authority, the Ordinance is not overbroad. Plaintiff's hypothetical examples in which the amended definitions may be overbroad can be imagined are neither real nor substantial. *See J & B,* 152 F.3d at 366. In *Dumas,* this Court rejected the allegation that the definitions of specific sexually oriented businesses and specified anatomical areas under Chapter 41A were unconstitutionally vague or overbroad. *See Dumas,* 648 F. Supp. at 1075-76. While *Dumas* involved the alleged overbreadth of the definition of specified anatomical areas, which was defined as "human genitals in a state of sexual arousal," *see supra* FOF ¶ 3, the Court concludes that the City's amendment of specified anatomical areas to include "any portion of the female breast or breasts that is situated below a point immediately above the top of the areola," does not render Chapter 41A unconstitutionally overbroad. As in *Dumas,* the amended definition of specified anatomical areas has been upheld by many courts, especially the Fifth Circuit in *SDJ. See SDJ,* 837 F.2d at

1276. Also, since *Dumas,* the City has never classified any mainstream business as a sexually oriented business even if such business featured an article or activity that displayed a specified anatomical area as defined by Chapter 41A. *See* Def.'s Ex. 24; Holt Testimony. Moreover, the Court has found that the City Attorney has offered a limiting construction that precludes the classification of mainstream businesses as sexually oriented businesses even if such businesses feature an article or activity that display a specified anatomical area.[1] *See supra* FOF ¶ 23; *see also City of Dallas v. MD II Entertainment, Inc.,* 974 S.W.2d 411 (Tex. Civ. App. – Dallas 1998, no writ). Chief Holt testified that the police department relies on the City Attorney's construction of Chapter 41A, and does not and will not classify mainstream businesses as sexually oriented businesses under the amended definitions absent other circumstances. Such limiting construction effectively negates Intervenors' overbreadth challenge to the amended definitions. *See Broadrick,* 413 U.S. at 617, 93 S. Ct. at 2918 (rejecting overbreadth challenge to Oklahoma statute regulating political activity by using interpretations of the statute by a state agency and the attorney general as limiting constructions); *J & B,* 152 F.3d at 367; *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1254-55 (5th Cir. 1995). Furthermore, even assuming that hypothetical examples in which the amended definitions may be overbroad can be imagined, such overbreadth is not substantial in light of Chapter 41A's legitimate sweep. *See Broadrick;* 413 U.S. at 615-16, 93 S. Ct. at 2918; *J & B,* 152 F.3d at 366. Because application of the overbreadth doctrine is "strong medicine" and should only be used "as a last resort," whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which Chapter 41A may not be applied. *See Broadrick;* 413 U.S. at 615-16, 93 S. Ct. at 2918; *J & B,* 152 F.3d at 366. Finally, Intervenors' claim that the amended definitions are overbroad because their businesses may be classified as adult theaters or nude modeling studios rather than adult cabarets fails because Intervenors have not specified how such classification would affect their protected expression when compared to their classification as adult cabarets. In any event, even if such hypothetical classification can occur, any resulting overbreadth can be addressed on a case-by-case basis.

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[1] Had the Court accepted Intervenors' argument, CRAIG HOSADA, THE BARE FACTS VIDEO GUIDE (8th ed. 1998), a comprehensive collection of nudity in "mainstream" videos, would have been quite useful in identifying which mainstream businesses may be classified as sexually oriented businesses.

9. Intervenors' next claim alleges that the Ordinance is an unconstitutional content-based restriction on protected expression. Specifically, Intervenors claim that the amended definition of specified anatomical areas was enacted to suppress Intervenors' protected expression, was enacted without any finding linking semi-nude dancing and secondary effects, and is, assuming that there is such a link, not narrowly tailored to combat secondary effects. Relatedly, Intervenors also claim that the amended definition of specified anatomical areas operates to unconstitutionally deny access to protected expression. In support of their claim, Intervenors argue that the history of Chapter 41A and the City's subsequent amendments have prevented sexually oriented businesses from operating at available locations, the locations the City represents as being available are in fact unavailable, the amended

definition of specified anatomical areas further restricts any available locations, and the City's licensing/exemption procedure is a sham.

10. Because erotic adult entertainment is marginally protected by the First Amendment, zoning ordinances designed to address the adverse secondary effects associated with such entertainment are subject to an intermediate level of constitutional scrutiny. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46, 106 S. Ct. 925, 928 (1986); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976) ("it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magnitude than the interest in untrammeled political debate."). The Supreme Court has declared that such a zoning ordinance is analyzed as a "content-neutral" time, place, and manner regulation so long as it is justified without reference to the content of the regulated expression, is designed to serve a substantial governmental interest, and allows for reasonable alternative avenues of communication. *See Renton,* 475 U.S. at 49-50, 106 S. Ct. at 929-30. Under *Renton,* the government bears the burden of justifying that the regulation. *See J & B Entertainment,* 152 F.3d at 370 (citing *Renton,* 475 U.S. at 48); *SDJ,* 837 F.2d at 1273. However, the litigant challenging the regulation bears the burden of proving that the regulation does not allow for reasonable alternative avenues of communication because it denies him a reasonable opportunity to open and operate his business. *See Woodall v. City of El Paso,* 49 F.3d 1120 (5th Cir. 1995).

11. Under *Renton,* the City has adequately justified that Ordinance No. 23137 is a content-neutral time, place, and manner regulation because it was enacted without

reference to the content of Intervenors' expression. In enacting Ordinance 23137, the City's predominant concern was with addressing secondary effects associated with sexually oriented businesses. The preamble to the Ordinance states that

> WHEREAS, a number of businesses in the city that provide sexual stimulation and gratification to their patrons have circumvented and frustrated the intent of Chapter 41A by operating as Class A dance halls under Chapter 14 of the Dallas City Code; and
>
> WHEREAS, the provisions of Chapter 14 governing Class A dance halls are intended to regulate businesses where clothed patrons dance and not businesses where unclothed or scantily clad dancers perform to provide sexual stimulation and gratification to patrons; and
>
> WHEREAS, the city council finds that such businesses operating as Class A dance halls under Chapter 14 are, in effect, sexually oriented businesses and have the same harmful secondary effects on the surrounding community as the sexually oriented businesses currently regulated under Chapter 41A; and
>
> . . .
>
> WHEREAS, the city council finds that a concentration of sexually oriented businesses continue to contribute to a decline in the value of surrounding properties, to an increase in criminal activities in the surrounding community, and to urban blight and a downgrade in the quality of life in the surrounding community; and
>
> . . .

> WHEREAS, the city council believes that, to better protect the public health, safety, and welfare, it is necessary to adopt additional amendments to Chapter 41A that would enhance land use protection to residential areas and other surrounding areas; provide requirements for signs and exterior portions of sexually oriented businesses to reduce their harmful secondary effects upon the surrounding community; restrict the location of sexually oriented businesses near child-care facilities to protect the children that attend those facilities; and establish rules of conduct for certain sexually oriented business employees and customers.

Ordinance No. 23137 at 2-5. Moreover, the City reviewed numerous studies, held hearings, and made findings addressing secondary effects. *See* FOF ¶ 19. In short, the City's predominant concern in enacting the Ordinance was to address secondary effects and not to suppress Intervenors' protected expression. Thus, the Ordinance is a content-neutral time, place, and manner regulation justified without reference to the content of Intervenors' protected expression. *See Renton,* 475 U.S. at 48; *SDJ,* 837 F.2d at 1273; *cf. City of Erie v. Pap's A.M.,* ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___, (2000) WL 313381 at *9 (Mar. 29, 2000) (slip op.).

12. Because the Ordinance is a content-neutral time, place, and manner regulation of protected expression, the City must also prove that the Ordinance is narrowly tailored to further a substantial interest. *See Renton,* 475 U.S. at 49-50, 106 S. Ct. at 929-30. In *SDJ,* the Fifth Circuit held that

> a city may establish its substantial interest in the regulation by compiling a record with evidence that it may be reasonably believed to be relevant to the problem that the city addresses. We do not ask whether the regulator subjectively believed or was motivated by other concerns, but whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities.

SDJ, 837 F.2d at 1274 (internal citations omitted); *see also J & B,* 152 F.3d at 371 ("[T]he government must produce evidence that the challenged ordinance may advance its interest in combating adverse secondary effects attendant to nude dancing."). However, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is *reasonably believed to be relevant to the problem that the city addresses.*" *Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931 (emphasis added); *Pap's A.M.,* 2000 WL 313381 at *14. "A local government's interest in preserving the quality and character of neighborhoods and urban centers can . . . support restrictions on both public nudity and adult entertainment." *Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931. "In setting forth this interest, a local government may place great weight upon the experiences of, and studies conducted by, other local governments, as well as opinions of courts from other jurisdictions." *Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931; *Pap's A.M.,* 2000 WL 313381 at *14. "[The] appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 582, 111 S. Ct. 2456, 2469, 115 L. Ed. 2d 504 (1991) (Souter, J., concurring); *see also J & B,* 152 F.3d at 371-72; *Pap's A.M.,* 2000 WL 313381 at *23 (Souter, J., concurring). While the evidence produced by the government must demonstrate "a link between the regulation and the asserted governmental interest[ ] under a reasonable belief standard," *id.* (citing *Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931 (internal quotation marks omitted); *see also SDJ. v. City of Houston,* 837 F.2d at 1274), "legislation seeking to combat the secondary effects of adult entertainment *need not await localized proof of those effects.*" *Barnes,* 501 U.S. at 582, 111 S. Ct. at 2469 (Souter, J., concurring) (emphasis added). Finally, an ordinance is narrowly tailored if it effectively promotes the government's interest, but narrow tailoring is less important when the potential for overbreadth burdens sexually oriented expression, which is subject to less than full First Amendment protection. *SDJ,* 837 F.2d at 1276.

13. Under this standard, the City has easily justified that the Ordinance is narrowly tailored to further a substantial interest. The City's substantial interest in addressing actual or potential secondary effects associated with sexually oriented businesses is well-established. The preamble to the Ordinance expressly states that, prior to enactment, the City Council reviewed studies documenting the continued harmful effects of sexually oriented businesses on the surrounding community. *See* Ordinance No. 23137 at 2-3. Specifically, the Ordinance claims that the City Council reviewed studies by its expert, Peter Malin, in 1994 and 1997; studies conducted by Houston before the

adoption of its sexually oriented business ordinance in 1983 and before its enactment of its ordinance in 1986, 1991, and 1997; and the summary of land use studies compiled by the National Law Center for Children and Families in 1991 and 1994. *See id.* Moreover, the City Council engaged in numerous fact-finding sessions consisting of the City Plan Commission's public hearings, the ZOAC's solicitation and review of public comment on the Ordinance, and the City Council's town hall meetings and public hearings, after which the City Council concluded that sexually oriented businesses were causing harmful secondary effects and that the Ordinance was necessary to combat such effects. *See supra* FOF ¶ 19. While Intervenors presented testimony and evidence attempting to negate the empirical validity of the City's fact-finding, *see, e.g.,* McLaughlin Testimony, under the prevailing legal authority, the Court's concern "is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes,* 501 U.S. at 582, 111 S. Ct. at 2469 (Souter, J., concurring). Thus, Intervenors' protests fail to negate the City's production of more than adequate evidence to support the City's reasonable belief that the Ordinance was necessary to combat harmful secondary effects.

14. While Plaintiff and Intervenors make much of the fact that the City reviewed no study or made no finding that amending the definition of specified anatomical areas to, in effect, require dancers to wear bikini tops would reduce secondary effects, such study or finding is unnecessary under *Renton.* Intervenors correctly note that this Court held the 1993 amendments similar to the

Ordinance unconstitutional as content-based restrictions on expressive activity. *See MD II(2),* 935 F. Supp. at 1397. The Court reached that conclusion because the City did not produce any evidence of the link between its substantial interest and the ordinance in combating secondary effects. In reaching this conclusion, the Court stated that "no evidence indicates that a requirement that dancers wear bikini tops instead of pasties will reduce deleterious secondary effects." *Id.* at 1397. However, in this case the City has apparently learned from the Court's nullification of the 1993 amendments and has compiled more than adequate evidence justifying the Ordinance. *See* FOF ¶ 19. Although the evidence does not connect the wearing of bikini tops to the reduction of secondary effects, such specific finding is not necessary as long as the City has produced evidence demonstrating a reasonable belief that there is a link between the Ordinance and the substantial interest in combating secondary effects associated with adult entertainment. *See Renton,* 475 U.S. at 51-52; 106 S. Ct. at 931; *SDJ,* 837 F.2d at 1274. The Ordinance simply is not an incrementally stricter regulation of semi-nude dancing that requires a commensurately greater amount of evidence that the regulation is linked to semi-nude dancing, but rather the City's concerted effort to prevent sexually oriented businesses' exploitation of a "loophole" in the City Code that permitted such businesses to avoid the location restrictions by obtaining dance hall licenses pursuant to Chapter 14, which was not originally designed to regulate such businesses. As the City avers in the preamble to the Ordinance, since the original enactment of Chapter 41 in 1986, sexually oriented businesses have frustrated the City's interest in combating secondary effects by exploiting the loophole, and the Ordinance is a comprehensive amendment to Chapters 14 and 41A to carry out the City's original intent in combating secondary effects associated with sexually oriented businesses. In this light, *MD II(2)* is entirely consistent with *Renton* and the Court's conclusion in this case because the First Amendment requires only that the City prove that *it may be reasonably believed* that the regulation of adult entertainment, whether it is dancing performed in nudity, simulated nudity, or semi-nudity, is relevant to addressing secondary effects. *See Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931. Moreover, the Ordinance is consistent with the conclusions of other courts, including the Fifth Circuit, holding that the definition of "specified anatomical areas" to include "the portion of the breast immediately below the top of the areola" does not impermissibly restrict protected expression. *See SDJ,* 837 F.2d at 1276.

15. The Ordinance is also narrowly tailored. As stated above, the Ordinance is not overbroad. In addition, the Ordinance is designed to close a loophole exploited by sexually oriented businesses to avoid the location requirements and to effectively address any actual or potential secondary effects as a result of such exploitation. In this light, the Ordinance is narrowly tailored because it effectively promotes the City's substantial interest by classifying as sexually oriented businesses only those businesses that are associated with actual or potential secondary effects, and by classifying those businesses that have heretofore avoided the location restrictions of Chapter 41A. The fact that these objectives may be achieved by forcing Intervenors to either change their dancers' attire to avoid being classified as a sexually oriented business or relocate to a site that conforms with Chapter 41A's location requirements does not make the Ordinance insufficiently tailored because sexually oriented expression is

entitled to less than full First Amendment protection. *SDJ,* 837 F.2d at 1276.

16. Under the final part of *Renton*'s analysis, an ordinance is constitutional if it does not unreasonably limit alternative avenues of communication. *See Renton,* 475 U.S. at 45, 106 S. Ct. 925. However, the fact that sexually oriented businesses "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation," and the First Amendment does not compel "the Government to ensure that [sexually oriented businesses], or any other kind[ ] of speech-related business[ ] for that matter, will be able to obtain sites at bargain prices." *Id.* at 54, S. Ct. at 932. The First Amendment only requires that the government "refrain from effectively denying [adult entertainment businesses] a reasonable opportunity to open and operate an adult theater within the city." *Id.* To this end, courts have held that 5-10% of land available for sexually oriented businesses constitutes a reasonable opportunity to pursue alternative avenues for communication. *See, e.g., id.* (holding the availability of 5% of land in Renton for adult theaters constitutional); *Woodall,* 49 F.3d at 1126-27 (holding that at least 50-66 sites available for 22-39 businesses was adequate); *Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 973 F.2d 1255, 1259-60 (5th Cir. 1992) (holding that because there is no constitutional requirement that a specific proportion of a municipality be open for sexually oriented businesses or that a certain number of sites be available, the availability of 4 areas with 8-10 locations for 6 business was more than

adequate); *SDJ,* 837 F.2d at 1276 (holding that the availability of at least 40 sites within 20% of Houston for 23 businesses was adequate).

17. The Ordinance does not unreasonably limited alternative avenues of communication for Intervenors' businesses. Considering the evidence and testimony presented by Intervenors and the City, and considering all the factors that may preclude the availability of sites for sexually oriented businesses, there are approximately 80-90 sites available for the 18-22 sexually oriented businesses that may be required to relocate under the Ordinance. *See* FOF ¶ 25. Under the authority cited above, such number affords adequate avenues of communication for sexually oriented businesses. *See Woodall,* 49 F.3d at 1126-27; *Lakeland Lounge,* 973 F.2d at 1260. While Intervenors did prove that the 244 sites the City claimed was available was inaccurate because many of those sites were not commercially feasible, erroneously listed as available, restricted by deed, or precluded because of a protected use, even if those reasons affect the analysis of the adequacy of sites, Intervenors did not prove that the number of available sites was less than 80-90. *See* Coker Testimony.

18. Intervenors' claim that the City's application of its licensing scheme effectively denies a reasonable opportunity to pursue adequate alternative avenues of communication is credible, but not persuasive. While the City has sometimes manipulated the licensing and exemption procedure so that sexually oriented businesses are denied licenses or exemptions, 41% of exemption applications were granted from 1991-1997, and licenses were generally issued if an applicant met the statutory criteria. *See* FOF ¶ 26; Holt Testimony; Craft Testimony. The Court does conclude that the decision making processes of the PLAB

and the board of adjustment are troubling. For example, the City has appointed individuals with questionable impartiality to the PLAB, tolerated certain councilors' ex parte requests to deny location exemptions for particular applicants, and, at least on one occasion, has inexplicably reduced the amortization period of one Intervenor from thirteen years to 90 days. *See* Martinez Testimony.

19. However, while these actions may seem to "stack the deck" against sexually oriented businesses trying to obtain licenses and exemptions, they do not necessarily result in a denial of a reasonable opportunity to pursue alternative avenues of communication because the City has granted exemptions and licenses if applicants met the statutory criteria. Moreover, the denial of a license, exemption, or an appropriate amortization period is subject to judicial review. *See* DALLAS CITY CODE § 41A-11; TEX. LOCAL GOV'T CODE ANN. § 211.011 (West 1999); *cf. City of Dallas v. MD II Entertainment, Inc.,* 974 S.W.2d 411 (Tex. Civ. App. – Dallas 1998, no writ). Nonetheless, whether such actions by the City may give rise to a claim upon which relief can be granted under another provision of the Constitution is not before the Court because Intervenors have not so pleaded, and the Court expresses no opinion on whether any Intervenor has a cause of action under any state or federal law because of such actions or on whether any Intervenor may later prove with sufficient evidence that such actions of the City give rise to a First Amendment challenge based on such actions constituting an effective denial of a reasonable opportunity to open or operate their businesses under *Renton*'s analysis. Simply put, Intervenors have not adduced sufficient evidence before *this* Court that the City's actions deny such opportunity.

20. The "no-touch" provision of § 41A-18.1 prohibiting all touch between an employee of a sexually oriented business and a customer when the employee is revealing specified anatomical areas is constitutional. Intervenors claim that § 41A-18.1 is unconstitutionally overbroad and is a content-based regulation unjustified by a compelling interest. However, in *Hang On* the Fifth Circuit upheld a similar no-touch provision and held that "intentional contact between a nude dancer and a customer is conduct beyond the expressive scope of the dancing itself." *See Hang On,* 65 F.3d at 1254. The Fifth Circuit held that the no-touch provision was not overbroad, vague, or in violation of the Fourteenth Amendment's Equal Protection Clause. *See id.*

21. The Court concludes that § 41A-18.1 is constitutional because it is authorized by the Fifth Circuit's conclusion in *Hang On. See Hang On,* 65 F.3d at 1253 ("That the physical contact occurs while in the course of protected activity does not bring it within the scope of the First Amendment."). While the sexually oriented business-plaintiff in *Hang On* offered no testimony of the expressive nature of touch while a dancer is table or lap dancing, none of the testimony offered by Plaintiff and Intervenors in this case through Dr. Hanna and Ms. Milkovich persuades this Court to conclude differently than the Fifth Circuit in *Hang On.* Thus, § 41A-18.1 is constitutional.

III. CONCLUSION

For the reasons stated above, the Court concludes that City Ordinance No. 23137 is constitutional. A final judgment incorporating these findings and conclusions shall be entered forthwith.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
CHIEF JUDGE

Signed on ~~April~~ May 2, 2000.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

BABY DOLLS TOPLESS §
SALOONS, INC., d/b/a BABY §
DOLLS SALOON-EAST, §
§
Plaintiff, §
§
MD II ENTERTAINMENT, §
INC., d/b/a THE FARE WEST, §
and D. BURCH, INC., d/b/a §
BABY DOLLS TOPLESS §
SALOON, §
§
Intervenors, §
§
MAINSTAGE, INC., d/b/a P.T.'s §
GENTLEMEN'S CLUB; CLUB §
HOSPITALITY, INC., d/b/a §
CLUB LIPSTICK; FRANK §
SMITH, d/b/a SHEER D'LITE; §
OGC RESTAURANTS, L.L.C., §
d/b/a OBSESSIONS; SANTA §
FE CABARET, L.L.C., d/b/a §
SANTA FE CABARET; and §
CASE AND POINT, INC., d/b/a §
BARE FACTS, §
§
Intervenors, §
§
DIMITRI PAPATHANSIOU, §
d/b/a DOLL'S HOUSE; TOM §
K. LAZANAS, d/b/a BABY G'S §
and d/b/a FACES; and VJAC §
INVESTMENTS, INC., d/b/a §
VENUS, §
§
Intervenors §
§

v. §
§ **CIVIL ACTION NO.**
CITY OF DALLAS, § **3:97-CV-1331-R**
Defendant. §

FINAL JUDGMENT

(Filed May 2, 2000)

Pursuant to Rule 58 of the Federal Rules of Civil Procedure and the Court's Findings of Fact and Conclusions of Law, entered on May 2, 2000, it is hereby

ORDERED that final judgment is entered for Defendant on all claims raised by Plaintiff and Intervenors. It is further

ORDERED that the preliminary injunction entered by the Court on March 2, 1998, enjoining Defendant from enforcing Dallas City Code §§ 41A-2(3), (4), (6), (7), and (24), and 41A-13(f)-(i) as amended by Dallas City Ordinance No. 23137, is hereby **DISSOLVED**. It is further

ORDERED that, notwithstanding any agreement between a sexually oriented business and Defendant to the contrary, any sexually oriented business deemed to be a nonconforming use under Chapter 41A shall be permitted to continue for a period not to exceed six (6) months from the date of this Final Judgment. It is further

ORDERED that, notwithstanding any agreement between an owner of a sexually oriented business and Defendant to the contrary, an owner of a nonconforming sexually oriented business who cannot recoup actual investment within six (6) months from the date of this Final Judgment may request an extension of the compliance date from the board of adjustment as provided in

Dallas City Code § 41A-13(g) within six (6) months from the date of this Final Judgment. It is further

ORDERED that the board of adjustment shall provide a hearing on and determine any request for an extension of the amortization period as provided in Dallas City Code § 41A-13(h), with due consideration of whether the sexually oriented business can recoup actual investment within (6) months from the date of this Final Judgment. It is further

ORDERED that each party shall bear its own costs.

It is **SO ORDERED**.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
CHIEF JUDGE

Signed on May 2, 2000.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-10651

BABY DOLLS TOPLESS SALOONS INC, doing business as Baby Dolls Saloon-East

Plaintiff-Appellant

CASE AND POINT INC, doing business as Bare Facts; MD II ENTERTAINMENT INC, doing business as Fare West; D BURCH INC, doing business as Baby Dolls; MAINSTAGE INC, doing business as PT's Gentlemen's Club; CLUB HOSPITALITY INC, doing business as Club Lipstick; OGC RESTAURANTS, doing business as Obsessions; SANTA FE CABARET LLC, doing business as Santa Fe Cabaret; DIMITRI PAPATHANSIOU, doing business as Doll's House; TOM K LAZANAS, doing business as Baby G's, doing business as Faces; ALLEN-BURCH INC, doing business as the fare

Intervenor Plaintiffs-Appellants

v.

CITY OF DALLAS, TEXAS

Defendant-Intervenor
Defendant-Appellee

Appeals from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

(Filed Jul. 16, 2002)

Before DUHÉ, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is **DENIED**.

ENTERED FOR THE COURT:

/s/ Honorable Rhesa Barksdale
United States Circuit Judge

EXHIBIT 7

[LOGO]

CITY OF DALLAS

STATE OF TEXAS
COUNTY OF DALLAS
CITY OF DALLAS

I, **BARRY J. DAVIS**, Assistant City Secretary of the City of Dallas, Texas, do hereby certify that the attached is a true and correct copy of

Ordinance 23137

passed by the city council on **May 28, 1997**.

WITNESS MY HAND AND THE SEAL OF THE CITY OF DALLAS, TEXAS, this the **24th day of July 1997**.

/s/ Barry J. Davis
BARRY J. DAVIS
ASSISTANT CITY SECRETARY
CITY OF DALLAS, TEXAS

* * *

WHEREAS, the city council has adopted comprehensive regulations regarding the licensing and location of sexually oriented businesses and related matters, which are codified in Chapter 41A of the Dallas City Code; and

WHEREAS, a number of businesses in the city that provide sexual stimulation and gratification to their patrons have circumvented and frustrated the intent of Chapter 41A by operating as Class A dance halls under Chapter 14 of the Dallas City Code; and

WHEREAS, the provisions of Chapter 14 governing Class A dance halls are intended to regulate businesses where clothed patrons dance and not businesses where unclothed or scantily clad dancers perform to provide sexual stimulation and gratification to patrons; and

WHEREAS, the city council finds that such businesses operating as Class A dance halls under Chapter 14 are, in effect, sexually oriented businesses and have the same harmful secondary effects on the surrounding community as the sexually oriented businesses currently regulated under Chapter 41A; and

WHEREAS, Chapter 41A of the Dallas City Code was adopted after several studies from other cities were reviewed and public hearings were held, the findings of which are documented in Ordinance No. 19196 and incorporated into this ordinance and readopted by reference, and the city council finds that these previously adopted findings remain valid; and

WHEREAS, the city council has reviewed the original 1994 study and the updated 1997 study of the city's expert, Peter Malin, the studies conducted by the City of Houston before the adoption of its sexually oriented business ordinance in 1983 and before amendment of its ordinance in 1986, 1991, and 1997, and the summary of and use studies compiled by the National Law Center for Children and Families in 1991 and updated in 1994, and all of these studies document the continued harmful secondary effects of sexually oriented businesses on the surrounding community; and

WHEREAS, the city plan commission conducted public hearings on March 20, 1997 and April 3, 1997 regarding sexually oriented businesses and proposed amendments to Chapters 14 and 41A of the Dallas City

Code, and the zoning ordinance advisory committee received public comment at its March 27, 1997 meeting on the same subject; and

WHEREAS, city council members have held at least six town hall meetings regarding sexually oriented businesses and proposed amendments to Chapters 14 and 41A of the Dallas City Code; and

WHEREAS, the city council conducted a public hearing that began on May 14, 1997 and continued on May 28, 1997 regarding sexually oriented businesses and proposed amendments to Chapters 14 and 41A of the Dallas City Code; and

WHEREAS, at all of these public hearings and public meetings, testimony was received on the continued harmful secondary effects of sexually oriented businesses on the surrounding community; and

WHEREAS, the city council finds that a concentration of sexually oriented businesses continue to contribute to a decline in the value of surrounding properties, to an increase in criminal activities in the surrounding community, and to urban blight and a downgrade in the quality of life in the surrounding community; and

* * *

(4) CLASS C DANCE HALL means any place where dancing is scheduled one day at a time.

(5) ~~[CLASS D DANCE HALL means any place;~~

~~(A) where dancing is permitted one day a week or more by a person in a state of semi-nudity or simulated nudity; or~~

~~(B) that is advertised either on or off the premises;~~

~~(i) as topless;~~

~~(ii) as a gentleman's club, bar, or saloon;~~

~~(iii) as adult entertainment;~~

~~(iv) as x rated; or~~

~~(v) by any other term calculated to attract patrons with nudity, semi-nudity or simulated nudity;~~

[~~(6)~~] CLASS E DANCE HALL means any place where dancing is permitted seven days a week for persons from age 14 through age 18 only.

(6) [~~(7)~~] IN SESSION means the status of a school during the fall or spring term when students are required to attend the school.

(7) [~~(8)~~] LATE-HOURS PERMIT means a permit authorizing a licensee to operate a Class A, B, or C [~~, or D~~] dance hall until 4:00 a.m.

(8) [~~(9)~~] LICENSE means a permit to operate a dance hall.

(9) [~~(10)~~] LICENSEE means a person in whose name a license to operate a dance hall has been issued, as well as the individual listed as an applicant on the application for a dance hall license.

(10) [~~(11)~~] PERSON means an individual, partnership, corporation, association, or other legal entity.

(11) [~~(12)~~] PRIVATE CLUB means an association of persons for the promotion of some common object, which operates not for a profit a place for the accommodation of its members and guests only.

(12) [~~(13)~~] SCHOOL means a public or private elementary or secondary school

[~~(14) SEMI-NUDITY means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and any part of the female breast below the top of the areolae, as well as parts of the body covered by supporting straps or devices.~~

[~~(15) SIMULATED NUDITY means a state of dress in which any device or covering, exposed to view, is worn that simulates any part of the genitals, buttocks, pubic region, or any part of the female breast below the top of the areolae.~~]

SEC. 14-2. LICENSE REQUIRED.

(a) A person commits an offense if he operates a dance hall without a license.

(b) An application for a license must be made on a form provided by the chief of police. The applicant must be qualified according to the provisions of this chapter.

(c) A person who wishes to operate a dance hall must sign the application for a license as applicant. If a person who wishes to operate a dance hall is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as an applicant. Each applicant must meet the requirements of Section 14-3(a), and each applicant will be considered a licensee if a license is granted.

(d) It is a defense to prosecution under this section that the actor is conducting a dance at:

(1) a private residence from which the general public is excluded;

(2) a place owned by the federal, state, or local government;

(3) a public or private elementary school, secondary school, college, or university;

(4) a place owned by a religious organization; or

(5) a location where no more than three dances a month are conducted and the actor is a private club.

* * *

(2) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(3) [~~(2)~~] ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment that [~~which~~] as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(a) books, magazines, penodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations that [~~which~~] depict or describe "specified sexual activities" or "specified anatomical areas"; or

(b) instruments, devices, or paraphernalia that [~~which~~] are designed for use in connection with "specified sexual activities."

(4) [~~(3)~~] ADULT CABARET means a [~~nightclub, bar, restaurant, or similar~~] commercial establishment that [~~which~~] regularly features the offering to customers of live entertainment that:

(A) is intended to provide sexual stimulation or sexual gratification to such customers; and [~~persons who appear in a state of nudity; or~~]

(B) is distinguished by or [~~live performances which are~~] characterized by an emphasis on matter depicting, simulating, describing, or relating to [~~the exposure of~~] "specified anatomical areas" or [~~by~~] "specified sexual activities," ~~or~~

[~~(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."~~]

(5) [~~(4)~~] ADULT MOTEL means a hotel, motel, or similar commercial establishment that [~~which~~]:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions that [~~which~~] are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way that [~~which~~] advertises the availability of this adult type of photographic reproductions; or

* * *

(D) the. relocation of any sexually oriented business.

(13) [~~(11)~~] HISTORIC DISTRICT means an historic overlay zoning district as defined in the Dallas Development Code, as amended.

(14) [~~(12)~~] LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(15) [~~(13)~~] NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(16) [~~(14)~~] OPERATES OR CAUSES TO BE OPERATED means to cause to function or to put or keep in operation. A person may be found to be operating or causing to be operated a sexually oriented business whether or not that person is an owner, part owner, or licensee of the business.

(17) [~~(15)~~] NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(B) a state of dress that fails to completely and opaquely cover a human buttock, anus, male genitals, female genitals, or any part of the female breast or breasts that is situated below a point immediately above the top of the areola.

(18) [~~(16)~~] PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(19) [~~(17)~~] RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family, or mobile home zoning district as defined in the Dallas Development code.

(20) [~~(18)~~] RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code.

[~~(19) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks, and any part of the female breast below the top of the areolae, as well as portions of the body covered by supporting straps or devices.~~]

(21) [~~(20)~~] SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity [~~or semi-nude~~].

(22) [~~(21)~~] SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(23) SIGN means any display, design, pictorial, or other representation that is;

(A) constructed, placed, attached, painted, erected, fastened, or manufactured in any manner whatsoever so that it is visible from the outside of a sexually oriented business; and

(B) used to seek the attraction of the public to any goods, services, or merchandise available at the sexually oriented business.

The term "sign" also includes any representation painted on or otherwise affixed to any exterior portion of a sexually oriented business establishment or to any part of the tract upon which the establishment is situated.

(24) [~~(22)~~] SPECIFIED ANATOMICAL AREAS means:

(A) any of the following, or any combination of the following, when less than completely and opaquely covered:

(i) any human genitals pubic region, or pubic hair;

(ii) any buttock; or

(iii) any portion of the female breast or breasts that is situated below a point immediately above the top of the areola; or

(B) human male genitals in a discernibly erect state, event if completely and opaquely covered [~~of sexual arousal~~].

* * *

SECTION 7. That CHAPTER 41A. "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding Section 41A-18.1, entitled "Additional Regulations for Adult Cabarets," to read as follows:

SEC. 41A-18.1. ADDITIONAL REGULATIONS FOR ADULT CABARETS.

(a) An employee of an adult cabaret, while exposing any specified anatomical areas, commits an offense if the employee touches a customer or the clothing of a customer.

(b) A customer at an adult cabaret commits an offense if he touches an employee who is exposing any specified anatomical areas or touches the clothing of the employee.

(c) A licensee or an employees of an adult cabaret commits an offense if he permits any customer access to an area of the premises not visible from the manager's station or not visible by a walk through of the premises without entering a closed area excluding a restroom."

SECTION 8. That a person violating a provision of this ordinance governing locational restrictions of a dance hall or sexually oriented business, upon conviction, is punishable by a fine not to exceed $2,000, and a person violating any other provision of this ordinance, upon conviction, is punishable by a fine not to exceed $500.

SECTION 9. That CHAPTERS 14 and 41A of the Dallas City Code, as amended, will remain in full force and effect, save and except as amended by this ordinance.

SECTION 10. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

* * *